TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted] 19

[redacted] H. LINCOLN, APPELLANT,

vs.

THOMAS E. JONES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

(21,556.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 174.

ISOBEL H. LENMAN, APPELLANT,

vs.

THOMAS R. JONES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 1955.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

a Supreme Court of the District of Columbia.

No. 25493. Equity.

THOMAS R. JONES, Complainant,
vs.
ISOBEL H. LENMAN and JEANNETTE R. LENMAN.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill.*

Filed June 15, 1905.

In the Supreme Court of the District of Columbia.

No. 25493. Equity.

THOMAS R. JONES, Complainant,
vs.
ISOBEL H. LENMAN and JEANNETTE R. LENMAN, Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court for said District:

The bill of complaint of Thomas R. Jones shows to the court as follows:

1. He is a citizen of the United States, a resident of the District of Columbia, and brings this suit in his own right. The defendants Isobel H. Lenman and Jeannette R. Lenman are, also citizens of the United States, residents of the District of Columbia, and are sued in their own right.

2. Heretofore, to wit, on the second day of May, A. D. 1905, the defendant Isobel H. Lenman was the owner in fee simple of Lots numbered Four (4), Five (5), Six (6) and Seven (7), in the Subdivision of the Heirs of John Davidson of Lots in Square Two hundred and twenty-two (222), in the City of Washington, in the District of Columbia, as per plat recorded in Liber N. K., folios 63 and 64 of the Records of the Office of the Surveyor of the District of
2 Columbia, subject only to the right of dower of the defendant Jeannette R. Lenman, as widow of the late John T. Lenman; and, being so seized, acting for herself, and, as the complainant is informed and believes, and therefore avers, acting also by and with the consent and authority of her co-defendant Jeannette R. Lenman, the said defendant entered into a written agreement or contract with Fannie E. Wilhoite, duly signed by them both, for the sale of the said real estate to the said Fannie E. Wilhoite at and for the price of Two hundred thousand ($200,000) Dollars, Fifty thousand ($50,000) Dollars thereof to be paid in cash, and the remaining One hundred and fifty thousand ($150,000) Dollars of the purchase money to be secured by a deed of trust on the said property, payable in three years, with interest at the rate of four and one-half per centum per annum, the taxes, interest, rents and insurance to be adjusted to the date of the delivery of the deed, the purchaser to make full settlement in accordance with the terms of the said sale within twenty-eight days from the said second day of May, A. D., 1905, the seller to give the usual special warranty deed, all of which will more fully appear from the said written contract or agreement, a copy of which is hereto annexed, marked "Exhibit A", and prayed to be read as part hereof; and, as the complainant is informed and believes, and therefore avers, the said Fannie E. Wilhoite, at the time of the execution of the said contract, made, and the said defendant Isobel H. Lenman accepted, a payment of One hundred ($100) Dollars to be applied in part payment for the said lots, as is recited in said "Exhibit A".

3. Thereafter, to wit, on the third day of May, A. D. 1905,
3 for a valuable consideration by him to her paid, the said Fannie E. Wilhoite sold, transferred and assigned to the complainant herein all her rights in and under the aforesaid contract or agreement, after which said transfer and assignment, to wit, on the 4th or 5th day of May, A. D. 1905, the said Isobel H. Lenman called upon the complainant at his place of business, informed him she had learned of the said transfer and assignment, and interposed no objection thereto, but conferred with the complainant about the manner of consummating the transaction, the notice which she desired to be given or the treatment which she desired to be accorded to the tenants of the premises sold, and other matters of detail incidentally connected with the consummation of the said contract, in which particulars complainant acceded to the wishes expressed by her, and thereupon she left your complainant without indicating any dissatisfaction upon her part with either the said contract, or with the purchase of it by said complainant, and without intimation that she did not propose to comply therewith upon her

part, or did not expect or require compliance by him, whereupon the complainant ordered an examination of the title and took the other necessary preliminary steps toward compliance therewith upon his part.

4. Thereafter, to wit, on or about the twenty-second day of May, A. D. 1905, the defendant Jeannette R. Lenman gave notice to the complainant that she would not consent to any sale of the said property, nor join in any deed of conveyance thereof, and that she "did not intend, by anything she may have said or done, to authorize a sale of the property or to consent thereto;" and, simultaneously, the defendant Isobel H. Lenman gave notice to the complainant that she was "unable to deliver a good and unincumbered title to the property, as she had expected to do", and that "any deed made by her would be subject to the claims and rights of her mother", at the same time tendering herself ready to return the One hundred ($100) Dollars, and "willing to cancel the sale as provided for in the receipt mentioned, in the case of her title being defective". Neither the complainant, nor the said Fannie E. Wilhoite, were informed, or knew, prior to these communications, that the defendant Jeannette R. Lenman had any interest in the said lots.

5. The complainant, whose purchase had been made for a special purpose, in which he was and is greatly interested, thereupon informed the defendant Isobel H. Lenman that he would accept a conveyance by her, without the concurrence of her co-defendant, and without holding her responsible for the dower interest of said co-defendant; and, thereafter, to wit, on the twenty-fifth day of May, A. D. 1905, the complainant tendered to the said Isobel H. Lenman the stipulated cash payment of Fifty thousand ($50,000) Dollars, in United States legal tender notes, and, in addition thereto, first, the promissory note of the said Fannie E. Wilhoite for One hundred and fifty thousand ($150,000) Dollars, payable three years after its date, to the order of the said defendant, with interest at the rate of four and one-half per centum per annum, payable semi-annually, secondly, a deed of conveyance from the said defendant to the complainant of the said described real estate, and, thirdly, a deed of trust to be executed by the complainant and his wife, which execution he tendered himself and her ready to make, conveying the said property to such trustees as the said defendant might nominate, to secure the said promissory note for the deferred purchase money, the said promissory note the said deed of conveyance, and the said proposed deed of trust being herewith filed, marked, respectively, Exhibits B, C, and D, and prayed to be read as part hereof. The said defendant, through her counsel, declared that she would waive the counting of the Fifty thousand ($50,000) Dollars, having no doubt that the money tendered was for that sum, and that she would accept the tender as sufficient, but would decline to execute the deed, or consummate the transaction. Upon inquiry by or on behalf of your complainant whether her said declination was based upon any clerical matter or matter of form, accompanied by the offer to make the papers satisfactory if the objection was based upon any question of form, said defendant, through her counsel,

answered that the declination was not based upon any technical or clerical objection, but that all objections would be reserved to the scheme of the papers, on the ground that the conveyance and transaction were not with Mrs. Wilhoite, whereupon Mrs. Wilhoite, being, also, there personally present, it was proposed by and on behalf of the complainant that the paper should be put into the form of a transaction exclusively with her, to which offer the said defendant then stated, through her counsel, that this would be unnecessary, as said defendant would execute no paper which did not recognize the rights of her mother; and, upon the further proposition,
6 which was then made on behalf of and with the concurrence of the complainant, who desired, if possible, to avoid controversy or litigation, that he would accept a deed which would recognize the dower rights of the defendant Jeannette R. Lenman, the defendant Isobel H. Lenman declared she would execute no papers which did not recognize a right in her co-defendant to a life interest in the property, which concession complainant declined to make. The defendant Jeannette R. Lenman having previously given to the complainant specific and emphatic notice that she would, under no circumstances, consent to the sale or execute any conveyance of the said property, and her co-defendant Isobel H. Lenman having thus declined, herself, to execute any conveyance thereof except upon terms to which the complainant was unable to accede, he considered it unnecessary and useless to make tender to the defendant Jeannette R. Lenman, and, for that reason, omitted to do so.

6. Upon his best knowledge, information and belief, the complainant avers that the contract of May 2nd, 1905, of which "Exhibit A" is a copy, was entered into and executed by the defendant Isobel H. Lenman after full conference with her co-defendant, and with the full knowledge and authority of the latter, and that, in making it, the said defendant Isobel H. Lenman acted as the duly authorized agent of her co-defendant, as well as on her own behalf.

7. The defendants, and each of them, still refuse to complete the said sale, or to accept said cash payment and agreed promissory note and deed of trust securing the same, for the deferred purchase money, and to execute a deed of conveyance by them, or by either of
7 them, to the complainant, for the said land and premises, although your complainant is still ready, willing and desirous to complete said sale. He is advised that he is entitled to have a conveyance of the interest of both of the defendants in said real estate, upon compliance by him with the terms of said contract of sale, with which terms he had been continuously, and here tenders himself, ready to comply. If, however, it shall be ascertained that, in making the said contract of sale with the said Fannie E. Wilhoite, the defendant Isobel H. Lenman did not have authority to act for the defendant Jeannette R. Lenman, and that the complainant is not entitled to a conveyance of the dower interest of the said Jeannette R. Lenman in said real estate, the complainant is, as he is advised and believes, and therefore avers, nevertheless entitled to have a conveyance of the said property by the said Isobel H. Lenman subject to the dower interest of her said co-defendant, and, in that event, he continues able and willing, and now here in court tenders himself

ready, to comply with the terms of the said contract of purchase on the part of the purchaser, on the like compliance on the part of the said Isobel H. Lenman.

Wherefore, and because he is without adequate remedy at law, the complainant prays as follows:

1. That the said Isobel H. Lenman and Jeannette R. Lenman may be served with process, made parties defendant hereto, and required to answer the exigencies of this bill, but not under oath, answer under oath being hereby expressly waived.

8 2. That the said defendants, and each of them, may be required specifically to perform the said contract of sale of May 2nd, 1905, and to make due conveyance of the said real estate therein described to the complainant, upon compliance by him with the terms of said contract; or,

3. If the court shall find that the defendant Jeannette R. Lenman did not authorize the said contract of sale, and is not bound thereby, then that the defendant Isobel H. Lenman may be required to make conveyance of the said real estate to the complainant, subject to the dower right of the said Jeannette R. Lenman, upon compliance by him with the terms of the said contract.

4. That the complainant may have such other and further relief as the nature of his case may require.

THOMAS R. JONES.

J. J. DARLINGTON,
DOUGLAS & DOUGLAS,
Solicitors for Complainant.

DISTRICT OF COLUMBIA, *ss:*

I, Thomas R. Jones, on oath say that I have read the foregoing bill of complaint by me subscribed, and know the contents thereof; that the matters and things therein stated as of my personal knowledge are true, and that those set forth upon information and belief I believe to be true.

THOMAS R. JONES.

Subscribed and sworn to before me this 14th day of June, A. D. 1905.

[SEAL.] CHAS. C. LAMBORN,
Notary Public in and for the District of Columbia.

9 EXHIBIT A.

Filed June 15, 1905.

Office of Early & Lampton, Real Estate & Loan Brokers, 615 14th Street N. W.

WASHINGTON, D. C., *May 2d*, 1905.

Received of Fannie E. Wilhoite, a deposit of One hundred ($100.00) Dollars, to be applied to part payment of purchase of sub Lots 4, 5, 6 and 7 Square 222 known as the Lenman Building,

Sold her for Two hundred thousand dollars net on following terms: $50,000.00 cash, balance of $150,000.00 to be secured by deed of trust, payable in 3 years with interest at the rate of four and one-half per centum per annum, on the property sold. Property sold as a good title, or deposit to be returned and sale declared off. Seller and her agents assume no responsibility for cost of Abstract, should title upon examination prove defective, nor for any damages by reason of said title proving defective. All taxes, interest, rents and insurance to be paid to date of delivery of deed. Purchaser is required, and agrees to make full settlement, in accordance with terms of sale, within Twenty-eight days from this date.

Seller to give the usual Special Warranty Deed. Conveyancing at Purchaser's cost.

EARLY & LAMPTON,
Agents for Fannie E. Wilhoite.

Confirmed, ratified, and approved:
ISOBEL H. LENMAN (*Owner*).
FANNIE E. WILHOITE.
FANNIE E. WILHOITE (*Purchaser*),
Per E. & L.

10 EXHIBIT B.

Filed June 15, 1905.

$150,000.00. WASHINGTON, D. C., —— —, 1905.

Three years after date, I promise to pay to the order of Isobel H. Lenman One Hundred and fifty thousand Dollars, for value received, with interest, payable semi-annually at the rate of 4½ per cent. per annum, until paid; each instalment of interest to bear interest after maturity thereof, if not then paid, at the rate aforesaid.

FANNIE E. WILHOITE.

Retain this note when it is paid, that the Trustees may be satisfied as to its payment when a release is desired.

Due ——.

The Real Estate Title Insurance Company and the Columbian Title Insurance Company.
Offices: No. 500 Fifth Street N. W.
Secured by Deed of Trust
To ——
On Lots 4, 5, 6 & 7, Sq. 222.

11 EXHIBIT C.

Filed June 15, 1905.

Whereas, the hereinafter mentioned Isobel H. Lenman made sale of the hereinafter described land and premises, unto Fannie E. Wilhoite;

And whereas, the said Fannie E. Wilhoite has assigned her said

purchase and all her interest in and to said land and premises, unto Thomas R. Jones, in evidence of which assignment the said Fannie E. Wilhoite has become a party to and executes these presents; and the said Thomas R. Jones having fully complied with the terms of said sale, is entitled to this conveyance,

Now therefore,

This deed, Made this — day of ——, A. D. 1905, Witnesseth, that the said Isobel H. Lenman, only child and sole heir at law of John T. Lenman deceased, of the District of Columbia, and the said Fannie E. Wilhoite, of the same place, hereinafter designated as the parties hereto of the first part, for and in consideration of the sum of Ten Dollars in current money of the United States, to each in hand paid by the said Thomas R. Jones, of said District of Columbia, hereinafter designated as the party hereto of the second part, receipt of which, at the delivery hereof, is hereby acknowledged, have bargained and sold, granted, enfeoffed and conveyed, and do hereby bargain and sell, grant, enfeoff and convey unto and
12 to the use of the said party hereto of the second part, his heirs and assigns the following described land and premises, with the improvements, easements and appurtenances thereunto belonging, situate and lying in the City of Washington, in the District of Columbia, namely:

Lots numbered Four (4), Five (5), Six (6) and Seven (7) in the Subdivision made by the heirs of John Davidson, of lots in Square numbered Two hundred and twenty-two (222), as per plat recorded in Liber N. K. folios 63 and 64 of the Records of the Office of the Surveyor of the District of Columbia.

To have and to hold the said land and premises, with the improvements, easements and appurtenances, unto and to the use of the said party hereto of the second part, his heirs and assigns, forever.

And the said parties hereto of the first part do severally and respectively and not jointly hereby covenant to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

In testimony whereof, on the day and year first hereinabove written, the said parties hereto of the first part have hereunto set their hands and seals.

—— ——. [SEAL.]
FANNIE E. WILHOITE. [SEAL.]

Signed, sealed and delivered in the presence of—
—— ——.

13 DISTRICT OF COLUMBIA, *to wit:*

I, —— ——, a Notary Public in and for the said District, do hereby certify that Isobel H. Lenman (unmarried) and Fannie E. Wilhoite (widow) the grantors in and who are personally well known to me as the persons who executed the aforegoing and annexed Deed dated —— A. D. 1905, personally appeared before me, in the District aforesaid, and acknowledged said Deed to be their act and deed.

Given under my hand and official seal, this — day of —— A. D. 1905.

——— ———,
Notary Public, D. C.

14 EXHIBIT D.

Filed June 15, 1905.

This deed of trust, Made this — day of ——, in the year nineteen hundred and five by and between Thomas R. Jones and Elizabeth B. Jones his wife, of the District of Columbia, parties hereto of the first part; and —— - parties hereto of the second part:

Whereas, Fannie E. Wilhoite is justly indebted unto Isobel H. Lenman in the full sum of One hundred and fifty thousand Dollars ($150,000.) for the deferred purchase money for the hereinafter described land and premises, for which the said Fannie E. Wilhoite has executed and delivered her one certain promissory note bearing even date with these presents, payable to the order of the said Isobel H. Lenman, three years after date, with interest thereon from date and until paid, at the rate of four and one-half per centum per annum, payable semi-annually; each instalment of interest to bear interest after maturity, if not then paid, at the rate aforesaid.

And whereas, the parties hereto of the first part desire to secure the full and punctual payment of said debt and interest thereon, as well as any renewals or extensions of said note, and any notes hereafter give for interest covering any extension, with interest thereon from maturity of the same; and also to secure the reimbursement to the holder or holders of said note and to the parties hereto of the second part or the survivor, and any purchaser or purchasers, grantee
15 or grantees, under any sale or sales under the provisions of this Trust, for any and all costs and expenses, including reasonable counsel fees, incurred or paid on account of any litigation at law or in equity, which may arise in respect to this Trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the premises after any sale which may be made as hereinafter provided for.

Now, therefore, this deed of trust, witnesseth, that the parties hereto of the first part, in consideration of the premises, and of One Dollar in lawful money, do grant, bargain and sell, and convey unto the parties hereto of the second part in fee simple, the following-described land and premises with the improvements, easements, rights, ways and appurtenances thereunto belonging, situate and lying in the City of Washington, District of Columbia, namely:

Lots numbered Four (4), Five (5), Six (6) and Seven (7) in the Subdivision made by the heirs of John Davidson, of lots in Square numbered Two hundred and twenty-two (222), as per plat recorded in Liber N. K. folios 63 and 64 of the Records of the Office of the Surveyor of the District of Columbia.

To have and to hold the said described land and premises, unto

and to the only use of the said parties hereto of the second part, in fee simple:

In and upon the uses and trusts following, that is to say:

First. Until any default in payment of any matter of indebtedness hereby secured as herein provided for, to permit the said Thomas R. Jones, his heirs and assigns, to possess and enjoy
16 said described premises, and to receive the issues and profits thereof; and on full payment of said note, and of any extensions or renewals thereof and the interest thereon; and all sums advanced or expended in respect to this Trust (including cost of advertising and such commissions as may be allowed by law and are not otherwise herein provided for), to release and re-convey in fee unto and at the cost of the said Thomas R. Jones or the party or parties then claiming under him,—the aforesaid land and premises.

Second. Upon any default being made in payment of said note or of any instalment of principal or interest thereon, or of any renewal or extension thereof, or of any note or notes hereafter given for interest covering any extension, with the interest thereon from maturity of the same, when and as the same shall become due and payable; or upon any default in payment, when due, of any tax or assessment, general or special, now or hereafter assessed against said land and premises, or any part thereof, while this Trust exists, or upon any default in keeping while this Trust exists, a fire insurance on the buildings on said land in an amount, in the name, and to the satisfaction of the parties hereto of the second part, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether then due or not, unless the party entitled to receive shall waive the right to have the same so applied; or upon any default in payment on demand, of any sum or sums advanced by the holder or holders of said note on account of any costs and expenses of this Trust, or on account of any such tax or assessment, or insurance, or expense of litigation, with interest thereon at six per centum from date of advance (it being hereby agreed that
17 on default in payment of said costs, expenses, tax or assessment, or insurance, or expense of litigation as aforesaid, the same may be paid by the holder or holders of said note, and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then upon any and every such default so made as aforesaid, the said parties hereto of the second part, or the survivor, or substituted Trustee, shall sell the hereinabove granted and described land and premises, and improvements, at public auction, at such time and place, upon such terms and conditions, with such postponement of sale or re-sale, and after such previous public notice, not less than ten days, as to the said parties hereto of the second part, or the survivor, or substituted Trustee, shall seem best for the interest of all parties concerned; and (the terms of sale being complied with) shall convey in fee to and at the cost of the purchaser, the premises so sold, such purchaser being hereby discharged from all liability for the application of the purchase money; and shall apply the proceeds of sale (after paying all expenses of sale, all taxes and assessments thereon due,

all sums advanced for costs or taxes and assessments, or insurance, or expense of litigation as aforesaid with interest as aforesaid, and a Trustee's commission of two per centum on the gross amount of sales), to the payment of the aforesaid indebtedness, or so much thereof as may then remain unpaid, whether then due or not, and the interest thereon to date of payment (it being agreed that said note shall, upon such sale being made before the maturity of
18 said note, be and become immediately due and payable, at the election of the holder thereof), paying over the surplus, if any, to the said Thomas R. Jones, his heirs or assigns, upon the surrender and delivery to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession thereof.

And the said Thomas R. Jones does hereby covenant that he will warrant specially the property hereby conveyed, and that he will execute such further assurances of said land as may be requisite for vesting title in the said parties hereto of the second part, for the uses and purposes and upon the trusts hereinbefore declared.

In Testimony Whereof, on the day and year first hereinabove written, the said parties hereto of the first part have hereunto set their hands and seals.

—— ——. [SEAL.]
—— ——. [SEAL.]

Signed, sealed and delivered in the presence of
—— ——.

DISTRICT OF COLUMBIA, *To wit:*

I, —— ——, a Notary Public in and or the aforesaid District do hereby certify that Thomas R. Jones and Elizabeth B. Jones, his wife, the grantors in, and who are personally well known to me to be the persons who executed the aforegoing and annexed
19 Deed, bearing date ——, A. D. 1905, personally appeared before me in the aforesaid District, and acknowledged the said Deed to be their act and deed.

Given under my hand and official seal this — day of ——, A. D. 1905.

——, ——,
Notary Public, D. C.

20 *Answer of Isobel H. Lenman.*

Filed December 4, 1905.

In the Supreme Court of the District of Columbia.

No. 25493. Equity.

THOMAS R. JONES, Complainant,
vs.
ISOBEL H. LENMAN, JEANNETTE R. LENMAN, Defendants.

For answer to the bill of complaint, the defendant, Isobel H. Lenman, says:

1. She admits the averment of the first paragraph of the bill of complaint as to the residence of the parties to this suit.

2. As to the ownership of lots numbered four, five, six and seven in the subdivision of the heirs of John Davidson of lots in square 222, in the City of Washington, District of Columbia, on the 2nd day of May, 1905, this defendant says that the facts are as follows: John T. Lenman, this defendant's father, who died on the 17th day of March, 1892, was at the time of his death the owner of said lots in fee simple. He died intestate, leaving this defendant his sole heir at law, and leaving him surviving also his widow, the defendant, Jenette R. Lenman. Prior to his death, John T. Lenman verbally as well as by certain memoranda in writing, indicated to this defendant and her mother, and co-defendant, that it was his wish that upon his death said lots should go to the defendant, Jennette R.

21 Lenman, and that certain other real estate which he owned should go to this defendant. Shortly after the death of said John T. Lenman, and as soon as these defendants took up for consideration the property left by him, it was verbally agreed between this defendant and her co-defendant, that the said wishes of said John T. Lenman should be given effect as though he had left a valid will, disposing of his property in accordance with his wishes, as above mentioned. From that time, and down to the present time, this defendant has made, and now makes, no claim to any interest in said lots, or any part of them, or of the improvements thereon, but has recognized, and still recognizes the exclusive ownership in fee simple of her mother, in and to said lots. And this defendant is advised and avers that under these circumstances during said period, and on the 2nd day of May, 1905, the defendant, Jenette R. Lenman, was in equity the owner in fee simple of said lots, and that in equity this defendant had, and has, no interest in said lots.

Further answering the second paragraph of said bill of complaint this defendant admits that on or about the 2nd day of May, 1905, she signed a paper of which she believes exhibit "A" to the bill of complaint in this case is a copy. But she denies that in signing the same she acted by or with the consent or authority of her co-defendant. She admits further that at the time she so signed said paper there was given to her by James J. Lampton (who is hereinafter mentioned) his check as agent for Annie L. Lampton for the sum of $100.00, which check was not used, but was cancelled before the bringing of this suit, and its return was tendered.

22 Further answering the second paragraph of said bill of complaint, this defendant states that on the morning of May 2nd, 1905, Mr. Louis R. Peak, who had previously submitted to this defendant several lower offers for said property, from the Mr. Lampton who is mentioned in said Exhibit "A," called at the residence of defendants and stated to this defendant that he had another offer to submit and mentioned the amount, which was either $160,000 or $180,000, but which of the two amounts was mentioned this defendant is not now positive, but thinks it was $160,000. This defendant suggested to Mr. Peak that he submit the offer to defendant's mother, as it was her property, and who was at the time engaged in dusting some books in an adjoining or opposite room.

Mr. Peak then stated to defendant's mother in the hearing of this defendant the sum that had been offered; whereupon this defendant's mother, without stopping her work, replied that she "would not take a cent less than $200,000," to which Mr. Peak replied, "You will never get it."

When this defendant, subsequently on said 2nd day of May signed said paper, she was under the impression from the above mentioned remark made by her mother that the latter would be willing to sell for $200,000, but when the defendant returned to her home and informed her mother that this defendant had signed said paper, her mother expressed and plainly showed surprise and intense grief at what this defendant had done, and stated that she would not consent to the sale. On the evening of May 4th, the matter of signing a deed to Fannie Wilhoite for the property (which deed had been prepared at the instance of others than the defendants)
23 was broached to the defendant's mother, whereupon the latter stated that she would not sign the deed and would not complete the sale; that she did not wish or intend to sell the property at any price; and that she was greatly distressed over the matter.

Respondent then became fully aware that she had entirely misapprehended her mother and she now believes, and so states, that her mother, who is upwards of eighty-two years of age, did not intend to sell the property, and did not intend to authorize or to consent to its sale. Respondent further states that the property had not been offered for sale by defendants, and the several offers made by the said Lampton were neither solicited or encouraged by defendants or either of them, but said Lampton, by persistent urging induced this defendant to sign the aforesaid paper, exhibit "A," without due consideration and without consultation with her mother. Except as hereinbefore expressly admitted, this defendant denies the averments of paragraph two of said bill of complaint.

3. Answering the third paragraph of the bill of complaint, this defendant states that she does not admit that said Fannie Wilhoite sold, transferred and assigned all her rights in and under the aforesaid alleged contract or agreement or that she made a transfer and assignment of said alleged contract, but this defendant states that the plaintiff admitted and stated to this defendant on Friday, May 5th, 1905, that he had purchased said property from said Wilhoite or from said Lampton for the sum of two hundred and ten thousand dollars and that by the terms of this sale made by
24 said Wilhoite or said Lampton, the complainant was required to close the sale within five days from the time he purchased (which time defendant admits was May 3rd, 1905) and upon this information so given by complainant to this defendant, she avers and charges the fact to be that complainant was not an assignee or transferee of the alleged contract of sale, exhibit "A" but that the complainant was a purchaser from said Wilhoite or said Lampton at the specified sum of $210,000 for the property and that the time for the completion of his purchase was fixed by his contract with said Wilhoite or Lampton at five (5) days.

This defendant admits that she called on the complainant in his office at The National Safe Deposit, Savings and Trust Company's Building, of which Company the complainant was and is President,

her said call being made on Friday morning, May 5th, 1905. This defendant states that after introducing herself to the complainant she inquired if a Miss Wilhoite was in their employ and explained that she held an option on the Lenman Building and that this defendant supposed from certain things she had heard that the Company had purchased the property; the complainant then informed this defendant that Miss Wilhoite, he thought, was a clerk in Mr. Lampton's office and that the said company was the real purchaser but that the Company could not legally hold the property until it was ready to use it, and that he should hold it for the Company.

This defendant admits that she did not express any dissatisfaction with said contract or with the alleged purchase by the complainant, neither did she express her approval, the object of her visit
25 being to obtain certain desired information, which, if favorable, she thought might possibly overcome the opposition of her mother to the said sale.

This defendant does not know whether the complainant thereafter ordered an examination of title and took other preliminary steps towards compliance with his contract, which, as hereinbefore stated, was with said Wilhoite, or whether the complainant had previously to said interview ordered such examination and taken such preliminary steps, but this defendant requires strict proof of the time when said examination of title was ordered, and when such other preliminary steps were taken. This defendant states that complainant or his agent was notified on Monday morning, May 8th, 1905, that this defendant's mother positively refused to sign the deed aforesaid, or any deed, and was at the same time informed that defendants would reimburse any expenses incurred by complainant and see that the deposit made by him was returned, and she is still ready and willing to make such reimbursement; and this defendant does not admit or believe that complainant incurred any expense, or in any way altered the status of matters between the time of the said visit to him, and the time when his agent was notified of the refusal of defendant's mother to sign said deed, or to consent to the sale of said property.

4. This defendant admits that on or about the 22nd day of May, 1905, her co-defendant, by her attorney, notified by letter the complainant's attorney that she would not consent to any sale of said property, nor join in any deed or conveyance thereof, and that she had not authorized any sale thereof, or given her consent
26 thereto. She further admits that at the same time, and by the same letter, the complainant was notified that this defendant was unable to deliver a good and unencumbered title to the property as she had expected, and that any deed made by her would be subject to the rights and claims of her mother, and that at the same time she tendered herself ready and willing to return the $100 check which she had received at the time she signed said paper, and was willing to cancel the sale, as provided therein in case of her title being defective. The said letter was in reply to a letter from the complainant's attorney and fully set forth the rights of her mother as herein stated. Whether the complainant or said Fannie E. Wilhoite was informed prior to this communication that the defendant,

Jeannette R. Lenman, had any interest in the said lots, this defendant can neither admit nor deny.

5. As to the averment of the fifth paragraph of said bill of complaint that the complainant made the purchase in question for a special purpose in which he was and is greatly interested, this defendant upon information and belief avers that in fact the real intended purchaser of said property is the said The National Safe Deposit, Savings and Trust Company of the District of Columbia. She admits that after receiving the notification above referred to, the complainant informed her he would accept a conveyance of said lots by her alone, without holding her responsible for the dower interest of said Jeannette R. Lenman, but she avers that in this communication, and at all times, the complainant has been unwilling to accept a deed from this defendant, subject to the equitable
27 claim of ownership in fee simple of said property by said Jennette R. Lenman, and declined to recognize the right of said Jennette R. Lenman to even a life interest in said real estate. She admits that on or about the 25th day of May, 1905, the complainant made a tender, as alleged in said fifth paragraph. She further admits that she agreed to accept said tender as sufficient, and admits that she declined to make any deed or consummate the transaction, and that the complainant was informed at the same time by her authority that her declination was not based upon any technical or clerical objection. She further avers that at the same time she informed the complainant that she would execute no paper which did not recognize the rights of her mother in said real estate, and on information and belief this defendant admits that her co-defendant had previously given complainant notice that under no circumstances would she consent to said alleged sale, or execute any conveyance of said property.

6. This defendant denies that said contract of May 2nd, 1905, of which exhibit "A" to the bill of complaint is believed to be a copy, was entered into or executed by her after full conference with her co-defendant, or with the knowledge or authority of the latter, in making it, and denies that in signing said instrument this defendant acted with the knowledge or authority of her co-defendant, or as the agent of her co-defendant, but as hereinbefore stated, she signed said paper under a misapprehension of her mother's wishes.

7. This defendant admits that she and her co-defendant
28 still refuse to complete said sale, or to accept the cash payment or the promissory notes, and deeds of trust securing the same, referred to in said instrument.

Further answering said bill of complaint this defendant says that she is informed and advised, and, therefore, avers, that in the matter of this alleged assignment and purchase from Fannie E. Wilhoite, the complainant is acting not in his own interest, or for his own benefit, but solely in the interest and for the benefit of The National Safe Deposit, Savings and Trust Company, of the District of Columbia, a corporation governed by the provisions of sub-chapter 11 of Chapter XVIII of the Code of the District of Columbia, and that the purchase of said property by said Company is in violation of the law and against public policy. She further avers on

information and belief that the complainant while prosecuting this suit in his own name is carrying it on at the expense and for the benefit of said corporation, and that the alleged assignment of said Fannie E. Wilhoite to the complainant was made to him and not to said Company for the purpose of evading the law and to enable said Company to buy and hold real estate through him, which it could not legally buy or hold in its own name, and that for this reason as she is advised by counsel, the bill in this case should be dismissed.

And further answering this defendant shows that inasmuch as said Wilhoite sold to complainant at an advance of $10,000.00 that sum would be full compensation to her for any failure by this defendant to perform the said alleged contract, and defendant is advised by counsel that complainant whether as assignee of
29 said alleged contract, or as a purchaser from said Wilhoite, can have no better standing in this court than said Wilhoite, and further answering this defendant states that she is amply able to respond to a judgment for $10,000. or more, in the unencumbered real estate owned by her and standing in her name, and situate in the District of Columbia, many times $10,000. in value, without reference to the property involved in this suit, and this defendant is advised that upon the facts of this case, the bill in this case ought to be dismissed.

And having fully answered this defendant prays to be hence dismissed with her reasonable costs in this case most unjustly incurred.

ISOBEL H. LENMAN.

A. S. WORTHINGTON,
Solicitor for Def't.

I, Isobel H. Lenman, on oath say that I have read the foregoing answer by me subscribed, and know the contents thereof; that the facts therein stated of my own knowledge are true; and that those stated as upon information and belief, I believe to be true.

ISOBEL H. LENMAN.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 27th day of November, A. D., 1905.

[SEAL.] CHARLES E. MARSH,
Notary Public.

30 *Answer of Jennette R. Lenman.*

Filed December 4, 1905.

In the Supreme Court of the District of Columbia.

No. 25493. Equity.

THOMAS R. JONES, Complainant,
vs.
ISOBEL H. LENMAN, JENNETTE R. LENMAN, Defendants.

For answer to said bill of complaint this defendant says:

1. She admits the averments of the first paragraph of said bill of complaint.

2. As to the ownership of lots numbered four, five, six and seven in the subdivision of the heirs of John Davidson, of lots in square two hundred and twenty-two in the City of Washington, District of Columbia, on the 2nd day of May, 1905, this defendant says that the facts are as follows:

John T. Lenman, the husband of this defendant, died on the 17th day of March, 1892. At the time of his death he was the owner in fee simple of said above mentioned lots. He died intestate, leaving as his sole heir at law, the defendant, Isobel H. Lenman. Prior to his death, John T. Lenman verbally, as well as by certain memoranda in writing, indicated to this defendant and her daughter, and co-defendant, that it was his wish that upon his death said
31 lots, with the improvements thereon, then and now known as the Lenman Building, should go to this defendant, and that certain other real estate which he owned should go to his said daughter. Shortly after the death of said John T. Lenman, it was verbally agreed between this defendant and her said daughter that the said wishes of said John T. Lenman should be given effect as though he had left a valid will, disposing of his property in accordance with his wishes, as above mentioned. Accordingly from a long time prior to the 2nd day of May, 1905, and till the present time, this defendant was recognized by her co-defendant as the owner of said lots and the Lenman Building thereon, and the defendant, Isobel H. Lenman during the same period and in pursuance of said agreement between her and this defendant was recognized by this defendant as the owner of said other real estate clear of any right to dower therein on the part of this defendant. During such entire period and down to the present time said Isobel H. Lenman has not made, and does not now make, any claim to any interest in said lots or the improvements thereon, or to any part of the same, but recognized and still recognizes the exclusive ownership in fee simple of this defendant in and to said lots, and this defendant is advised and avers that under these circumstances during said period, and on the 2nd day of May, 1905, this defendant was, and is now, in equity, the owner in fee simple of said lots, and that in equity the defendant, Isobel H. Lenman, had, and has, no interest in said lots.

Upon information and belief she admits that her co-defendant, Isobel H. Lenman, on or about the 2nd day of May, 1905,
32 signed a paper of which exhibit "A" to the bill of complaint is a copy, but she denies that in doing so said Isobel H. Lenman was acting with the consent or authority of this defendant, but she believes that said Isobel signed said paper under a misapprehension of the wishes and intentions of this defendant.

3. She can neither admit nor deny the allegation of the third paragraph of said bill of complaint as to the alleged assignment by Fannie E. Wilhoite of said alleged contract, but requires a strict proof thereof, if material to complainant's case. On information and belief she admits that shortly after said alleged contract was signed, her co-defendant, Isobel H. Lenman, called upon the complainant at his place of business and had a conversation with him. On information and belief she further avers that during said conversation

the complainant admitted to said Isobel H. Lenman that in the matter of said alleged sale he was acting not for himself, but for The National Safe Deposit, Savings and Trust Company, of which corporation the complainant was and still is the President, and admitted also that he had purchased said property from said Wilhoite, or from James J. Lampton, for $210,000.00, and was required to make settlement in five days.

4. Answering the fourth paragraph of said bill of complaint this defendant states that she admits that she gave (by a letter of her attorney or agent) the notice mentioned in said fourth paragraph, and the rights claimed by this defendant in said property were as defendant is informed fully set forth in said letter, but this
33 defendant avers that her said attorney or agent had previously on May 8th, 1905, informed complainant or his agent that this defendant had not consented to the said sale, and would not sign any deed for said property, or consent to its sale, and then offered to reimburse complainant any costs he may have incurred and see that the deposit made on his purchase from said Wilhoite was returned to him, as she did not wish to be annoyed about the paper signed by her daughter. As to whether the said Fannie E. Wilhoite, or the complainant, was informed or knew prior to these communications, that this defendant had any interest in said lots, this defendant has no such knowledge or information as enables her to either admit or deny the same, and she calls for strict proof of the averments of the bill in that regard, if they be deemed material.

5. As to the averment of the fifth paragraph of said bill of complaint that the complainant made said purchase for a special purpose, in which he was and is greatly interested, this defendant on information and belief avers that in said alleged purchase the said The National Safe Deposit, Savings and Trust Company is the real party in interest.

6. This defendant denies that said contract of May 2nd, 1905, of which exhibit "A" to the bill of complaint is believed to be a copy, was entered into or executed by said co-defendant, Isobel H. Lenman, after full conference with this defendant, or with the knowledge or authority of this defendant in making it, and denies that in signing said instrument said co-defendant acted with the knowledge and authority of this defendant, or that said co-defendant was the agent of this defendant.

34 7. This defendant admits that she and her co-defendant still refuse to complete said sale, or to accept the cash payment, or the promissory notes, and deeds of trust securing the same, referred to in said instrument. This defendant further states that she never contemplated selling said property, never offered it for sale or sought in any way a purchaser for it, or agreed to sell it, or authorized any one to sell it, or to agree to sell it. The improvements on the lots in question consisting of a large office building with stores on the first floor and known as the "Lenman Building" were erected by the late husband of this defendant, as the crowning act of his business life, and given the family name, and her said husband repeatedly stated that it was his wish that this defendant should have said property upon his death, considering it a sure

provision for her in her old age, and she has, therefore, an attachment for the property beyond its intrinsic value, and it would greatly distress her to part with the property or to have it taken from her, and she is annoyed and grieved by the unjust and unfounded claims made against her herein, in respect to said property.

Further answering said bill of complaint this defendant says that she is informed and believes, and therefore avers, that in the matter of this alleged assignment and sale from Fannie E. Wilhoite, the complainant is acting not in his own interest, or for his own benefit, but solely in the interest and for the benefit of The National Safe Deposit, Savings and Trust Company of the District of Columbia, a corporation governed by the provisions of sub-chapter 11 of
35 chapter XVIII of the Code of the District of Columbia, and that the purchase of said property by said Company is in violation of the law and against public policy. She further avers on information and belief that the complainant while prosecuting said suit in his own name, is carrying it on at the expense and for the benefit of said corporation, and that the alleged assignment of said Fannie E. Wilhoite to the complainant was made to him and not to said Company for the purpose of evading the law and to enable the said Company to buy and hold real estate through him which it could not legally buy or hold in its own name.

And further answering the bill of complaint, this defendant says that she is informed that the transaction between the complainant and the said Wilhoite was in fact a purchase by the complainant from said Wilhoite at an advance of $10,000. over the price agreed to be paid by the said Wilhoite, and she avers on information and belief that the terms of the two sales were materially different. Wherefore this defendant is advised and avers that said Wilhoite has no standing in a court of equity to enforce said sale, but that her remedy is by an action at law for damages and that neither the complainant, nor The National Safe Deposit, Savings and Trust Company of the District of Columbia, claiming under said Wilhoite, can enforce in a court of equity any claim which the said Wilhoite could not enforce herself.

And having fully answered this defendant prays to be hence dismissed with her reasonable costs in this case most unjustly incurred.

JENNETTE R. LENMAN.

A. S. WORTHINGTON,
Solicitor for Def't, Jennette R. Lenman.

36 I, Jennette R. Lenman, on oath say that I have read the foregoing answer by me subscribed, and know the contents thereof; that the facts therein stated as of my own knowledge are true; and that those stated as upon information and belief, I believe to be true.

JENNETTE R. LENMAN.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 27th day of November, A. D., 1905.

[SEAL.] CHARLES E. MARSH,
Notary Public.

Joinder of Issue.

Filed January 6, 1906.

In the Supreme Court of the District of Columbia.

No. 25493. Equity.

THOMAS R. JONES, Complainant,
vs.
ISOBEL H. LENMAN, and JENNETTE R. LENMAN, Defendants.

The complainant joins issue upon the answers of the defendants in the above-entitled cause.

DOUGLAS & DOUGLAS,
J. J. DARLINGTON,
Solicitors for Complainant.

37 *Testimony on Behalf of Complainant.*

Filed Jul- 11, 1907, J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

In Equity. No. 25493.

THOMAS R. JONES
vs.
ISOBEL H. LENMAN and JEANETTE R. LENMAN.

WASHINGTON, D. C., *October* 27, 1906—10 o'clock a. m.

Met pursuant to notice at the office of Douglas & Douglas, Colorado Building, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Douglas.

Present on behalf of the defendant, Mr. Worthington.

LOUIS R. PEAK a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, was examined and testified as follows:

By Mr. DARLINGTON:

Q. Mr. Peak, in what business are you engaged? A. The
38 fire insurance business. I am the secretary of the Corcoran Fire Insurance Company.

Q. I believe the Lenman estate holds the majority of the stock of that company?

Mr. WORTHINGTON: I object to that. It is immaterial whether the Lenman estate owns any stock in that company.

A. Not a majority.

Q. Do you know the defendants Miss Isobel Lenman and Mrs. Jeanette Lenman? A. I do.

Q. How long have you known them? A. I have been with the company since January 3, 1882. Mr. Lenman was then president of the company, and I have known them since that time. Of course I was not as well known to them at first as I am now.

Q. What is your age, Mr. Peak? A. I am 41.

Q. What has been your business relations with these two ladies since the death of Mr. John T. Lenman? A. I have assisted them in doing business; that is, attending to some of the investments of their money.

Q. With which of them have your business transactions been conducted? A. I have had business with both, but principally with Miss Lenman.

Q. I believe it appears in the pleadings here, that you had some connection with this negotiation between Miss Lenman and Mrs. Wilhoite? A. I believe that is the name in the contract, but
39 I do not know who Mrs. Wilhoite is. I have never seen her.

Q. How did that negotiation originate, so far as you know? A. By Mr. Lampton calling at my office with an offer of $90,000. I think $90,000 was the original offer.

Q. For the property involved in this suit? A. Yes, sir. Of course, you are speaking now of the Lenman Building?

Q. Yes. What did you do with the offer? A. I submitted it to Miss Lenman.

Q. That was followed by other offers, was it? A. Yes, sir.

Q. What was the final proposition? A. The final offer?

Q. Yes? A. The final offer, as well as I remember, was $200,000.

Q. What did you do with that offer? A. I submitted it.

Q. To whom? A. Miss Lenman.

Q. Did you at any time have any conversation with Mrs. Lenman, the mother, in regard to the matter? A. On one occasion Mrs. Lenman was in the library, and that, I think, was the only time I had any conversation in regard to the Lenman Building with Mrs. Lenman.

Q. What was that conversation? A. Merely that I submitted the offer of $200,000—no; I will have to correct myself right
40 there. It was not at that time we had our conversation. It was at a previous offer.

Q. Before the $200,000 offer? A. Yes. I did not intend to say that at all. It was at one of these other offers that I had this conversation.

Q. What was the conversation? A. I suppose it was merely submitting the offer.

Q. Who was present besides the mother and yourself? A. Miss Lenman, Mrs. Lenman and myself. There were three of us.

Q. What did Mrs. Lenman say? A. Mrs. Lenman, as well as I remember, said in an offhand way "I will take $200,000." I think she said "I will take $200,000."

Q. What was off-hand about it? A. By that, I mean I don't

think she—of course, Mr. Darlington, I just wanted to say the best way I can the manner in which——

Q. You can tell us anything she said, but what you think is not competent. A. She kind of said "I will take $200,000."

Q. That is what she said? A. Yes, sir; that is the best of my recollection.

Q. Was or was not that at the time you made the offer immediately preceding the $200,000 offer? A. That I do not remember.

41 Q. According to your best recollection, how near was this to the time the $200,000 offer was made and accepted by Mrs. Lenman? A. Truly, Mr. Darlington, I really can't answer that question. I want to be honest about it.

Q. Oh, yes; I concede that. Do you know the hand-writing of Miss Isobel H. Lenman? A. I do.

Q. Please look at the paper marked exhibit A, filed with the original bill, dated May 2, 1905, and state whether the signature in the lower left hand corner is her signature? A. That is her signature.

Q. Were you present when this exhibit A, filed with the Bill, was received by Mr. Lampton—delivered to him? A. Yes, sir.

Q. Who delivered it to him? A. Miss Lenman.

Mr. DARLINGTON: I offer in evidence exhibit A, referred to, filed as an exhibit to the original bill.

Cross-examination.

By Mr. WORTHINGTON:

Q. When did you first hear or learn that Mrs. Wilhoite had anything to do with this transaction? A. I suppose when I read the contract, or saw the contract.

Mr. DARLINGTON: I desire to ask Mr. Peak a question I omitted by inadvertence.

By Mr. DARLINGTON:

42 Q. When, if ever, did you say anything to Mr. Lampton or any other party to this negotiation about Mrs. Lenman having any interest in the property or being in any way connected with it? A. I don't think I ever said anything about it, Mr. Darlington. I didn't think it was necessary.

By Mr. WORTHINGTON:

Q. Mr. Darlington's question referred to "Mr. Lampton or any other party connected with this negotiation." Who were the other parties connected with this negotiation whom you understand by that question? A. Mr. Lampton would be the only one.

Q. How long a period of time was it before the paper just offered in evidence was signed that Mr. Lampton first approached you on the subject of an offer for this property? A. Do you mean from the time that the first offer was made until the last one?

Q. Yes. A. Really, Mr. Worthington, I couldn't say how long it was, but it was not such a very great time.

Q. Do you know why he came to you about this property? A. Why Mr. Lampton came to me?

Q. Yes. A. He knew that I attended to some of Miss Lenman's business. I say Miss Lenman, because I always do my business with Miss Lenman.

Q. You have told us that you assisted her in making in-
43 vestments? A. Yes, sir.

Q. Have you otherwise acted for her in a business relation? A. Well, I have a house that I rent around on 12th street for her.

Q. That you rent for her? A. Yes, sir.

Q. Anything else? A. Then there is one up on 7th street, N. E.

Q. That is another house you got a tenant for? A. I didn't get the tenant for the house. The house on 7th street was deeded over to Miss Lenman in a trust. I think the party who owned the property just deeded it over to Miss Lenman.

Q. Have you told us all the subjects-matter of your relation with Miss Lenman of a business character? A. I think so, Mr. Worthington. I don't know of anything else.

Q. The Lenman Building is a pretty large Building, is it not? A. Yes, sir.

Q. It has been occupied of late years by a great variety of tenants? A. Yes, sir.

Q. Have you had anything to do, on behalf of Miss Lenman or Mrs. Lenman, with getting tenants for that building or with relation to it at all? A. None whatever.

Q. Do you know whether or not Miss Lenman had an
44 agent for that building? A. I think Mr. A. T. Coumbe was the agent for the building.

Q. He was and is? A. Yes, sir.

Q. And he has been for a great many years, has he not? A. Yes, sir.

Q. Do you know where his office is? A. In the building.

Q. Do you know whether or not Mr. Lampton was acquainted with him? A. I don't know whether Mr. Lampton was acquainted with him or not. I suppose he is.

Q. You have no personal knowledge? A. No, sir.

Q. Did Mr. Lampton give you any reason for coming to you about this matter? A. Well, Mr. Lampton is a friend of mine.

Q. My question is whether he gave you any reason; not whether there was any, but whether he gave you any reason for coming to you? A. I think Mr. Lampton told me to keep it quiet.

Q. Did he give any reason for wanting it kept quiet? A. No; I don't think he did.

Q. Did he state whom he represented? A. No, sir.

Q. Did he give you to understand that he was making the purchase for——

45 Mr. DARLINGTON: One moment.

Q. Did he say anything to you as to whether he was negotiating for the purchase for himself or for Mrs. Wilhoite, or for anybody? A. There was something said about Stilson Hutchins.

Q. Who said it? A. Mr. Lampton.

Q. What did he say? A. I really don't remember, Mr. Worthington.

Mr. DARLINGTON: I object to any conversation between the witness and Mr. Lampton, who is not a party to this suit, as being irrelevant, and immaterial to any issue involved, and as being incompetent.

By Mr. WORTHINGTON:

Q. Have you at any time made a memorandum of what took place at the conversation between you and Mrs. and Miss Lenman, when you think Mrs. Lenman said she would sell the property for $200,000? A. Have I ever made a memorandum of it?

Q. Yes. A. No, sir.

Q. I will ask you if what happened was not this, that you saw Miss Lenman first? A. Yes, sir.

Q. And submitted her an offer of $160,000 or $180,000, or something approximating that, and that she referred you to Mrs. Lenman, who was in an adjoining room dusting books or furniture or something, and that you repeated the offer to her, and that she said she would not take less than $200,000 for the property? A.

46 No; I don't remember that. My recollection, Mr. Worthington, was that Mrs. Lenman said, in an off-hand way "I will take $200,000."

Q. You were about to say something about her manner when Mr. Darlington said he only wanted what she said.

Mr. DARLINGTON: I object. I did not state that. I said to the witness I did not want him to tell us what he thought. I was quite willing to have him state anything that was said or done.

By Mr. WORTHINGTON:

Q. Subject to that correction, I repeat my question and ask you what there was, if anything, in Mrs. Lenman's manner that leads you to characterize what she said as an off-hand remark?

Mr. DARLINGTON: I object to that question, as to what there was in her manner. I am quite willing to have him state what she said or did.

A. It appeared to me——

Mr. DARLINGTON: I object to the witness stating what appeared to him. I think counsel himself must agree that that is not evidence. He may state anything that happened, but I object to any statement by the witness as to what appeared to him.

Mr. WORTHINGTON: I will ask the Examiner to read the question.

The question was read as follows:

"Q. I repeat my question, and ask you what there was, if anything, in Mrs. Lenman's manner that leads you to characterize what she said as an off-hand remark?"

47 A. Well, not giving it sufficient weight, possibly.

Mr. DARLINGTON: I object to the answer and move to strike it out, as not evidence of any fact.

By Mr. WORTHINGTON:

Q. Do you recall what Mrs. Lenman was doing at the time you had this conversation? A. I think she was standing at a table. I don't know that she was doing anything at the time.

Q. When you went there on this occasion, were the ladies together, or in different rooms? A. They were in different rooms.

Q. Which did you see first? A. Miss Lenman.

Q. Did the conversation you had with Miss Lenman take place in the hearing of Mrs. Lenman? A. During the entire conversation, Mrs. Lenman was not present.

Q. Where were you when Mr. Lampton received this paper that has just been offered in evidence? A. At my office. That is the contract?

Q. Yes. Is your office in the Corcoran Building? A. No, sir; 604 11th street.

Q. I wish you would state everything that took place at that time, as far as you recall it. A. As far as I can recall, Miss Lenman was not present when Mr. Lampton came. Mr. Lampton possibly was in or about the office for a half an hour or an hour prior to Miss Lenman's coming. Miss Lenman went back in the rear of-

48 fice, or the director's room, and signed the contract. That is about all there is to it.

Q. Was Mrs. Wilhoite there? A. No, sir; I don't know Mrs. Wilhoite.

Q. You said you never saw her? A. I never have; no, sir.

Q. Was there any other name at the foot of the paper, signed to it, when Miss Lenman signed it? A. Not to my knowledge.

Q. You say not to your knowledge, Mr. Peak—— A. Mr. Lampton signed the contract there.

Q. When did he sign it? A. I think Mr. Lampton signed it after Miss Lenman.

Q. And while she was there? A. Yes, sir.

Q. You say she went into the back room, the director's room, and signed it? A. Yes, sir.

Q. Did you go back there? A. Yes, sir.

Q. With her? A. Yes, sir.

Q. You think she signed it first, and then he signed? A. I think so.

Q. Did anybody direct her where to sign? A. Not to my knowledge.

Q. Was anything said about Mrs. Wilhoite, or where she was, or why she was not there? A. No, sir.

49 Q. Do you recollect any conversation that occurred between Miss Lenman and Mr. Lampton or anybody else after Miss Lenman came there on that occasion? A. Miss Lenman said something about she didn't want the proposition juggled around—I don't know exactly how to express it. She meant by that that she didn't want Mr. Lampton to go everywhere in order to get a purchaser for the property—something like that.

Q. Did Mr. Lampton say anything at that time about his already having a purchaser? A. He did.

Q. What did he say? A. That I don't remember.

Q. Do you remember whether he mentioned the name of the person whom he had as a purchaser? A. No, sir.

Q. Looking at this paper, the original contract just offered in evidence, I see what purports to be the signature of Fannie E. Wilhoite is written in there apparently after the signature above and below had been written. Do you know anything about when that was put there? A. I never have seen it before until today.

Q. Mr. Peak, when did you first learn that Mr. Jones, the president of the National Safe Deposit, Savings & Trust Company of the District of Columbia, or that company, had any interest in this transaction?

Mr. DARLINGTON: I object. There is no evidence in this case that Mr. Jones, as president of that company, or that company,
50 has any connection with this case. The witness has said nothing of the kind. If that is claimed by the defendants it is a part of their case, and not ours, and not the subject of legitimate cross-examination of this witness.

A. It was after the contract was signed.

Q. How long after? A. I suppose two or three days.

Mr. DARLINGTON: I object further unless the source of the witness' information is disclosed, and they are shown to be sources which would bind the complainant.

By Mr. WORTHINGTON:

Q. How long after the contract was signed? A. To the best of my recollection, two or three days.

Q. Who told you? A. That I couldn't say.

Q. You have no recollection at all on that subject? A. No, sir; only that it was after the contract.

Q. I say, you have no recollection at all of the person from whom you received the information? A. No, sir.

Q. Could you say whether or not it was Mr. Lampton? A. I couldn't say.

Q. You say you were requested by Mr. Lampton, when he was making these offers, to keep the matter quiet? A. Yes, sir.

Q. Did you, in fact, comply with that request and keep it
51 quiet? A. I did.

Q. Did you ask him why secrecy was necessary or desirable? A. He did not want it known.

Q. But did he say why he did not want it known? A. Oh, no; no, sir.

Q. Why was it, Mr. Peak, that if you had authority from Mrs. Lenman to sell this property for $200,000, you did not say anything to Mr. Lampton or to anybody else about her having any interest in it? A. Why I didn't say something?

Q. Yes. A. I didn't think it was necessary.

Q. Why did you go to Mrs. Lenman at all about it? A. I did not go to Mrs. Lenman, in a way. Miss Lenman called her mother, as I said before. I dealt entirely with Miss Lenman.

Q. Miss Lenman did not say she would sell for $200,000, did she? A. No, sir.

Q. But she referred you to her mother, and her mother said she would sell for $200,000, according to your recollection? A. Yes, sir; she said "I will take"—something like that.

Q. And yet when you reported back to Mr. Lampton, did you tell him that Mrs. Lenman had said she would sell for $200,000? A. Not to my knowledge.

52 Q. What did you tell him? A. I don't remember, Mr. Worthington.

Q. Then if you do not remember, you may have told him that Mrs. Lenman had said she would sell for $200,000? A. No; I don't think I told Mr. Lampton. I have no recollection of that at all.

Q. If you cannot remember what you did tell him, how can you remember you did not tell him about your conversation with Mrs. Lenman? A. I don't remember telling Mr. Lampton.

Q. That is a different thing from saying you did not tell him. Could you be sure you did not tell him just what had occurred? A. I couldn't say.

Q. In your dealings with Mr. Lampton, about this business, before the contract was signed, was anything said between you and him about your compensation for your services in the matter? A. Yes, sir.

Q. What was it? A. Mr. Lampton offered to give me $1500.

Q. Was that with reference to the first offer or to the last offer, or any intermediate offer? A. No; I think it was the last offer.

Q. Had he, prior to that time, made you any offers of compensation? A. That I don't remember. I don't remember when this offer was made. I know he told me if the sale was consummated he would give me $1500. I think it was near about the time of the consummation of the contract.

53 Q. That contract still holds good, I suppose, Mr. Peak? At least, in your mind it does, if this sale goes through? A. Well, Mrs. Lenman didn't sign the contract.

Q. But you understand that if this sale is—— A. You mean the compensation?

Q. Yes. A. Oh, yes; I think so.

Q. If the sale goes through by reason of this equity suit, you will be entitled to your $1500? A. Yes, sir.

Q. And to that extent you are interested in the result? A. Certainly.

Q. Had you seen Miss or Mrs. Lenman about this matter between the time that you think Mrs. Lenman told you she would sell for $200,000 and the time you met Miss Lenman in your office, when the contract was signed? A. No; I don't think I saw Mrs. Lenman after that time.

Q. Had you seen Miss Lenman? A. Oh, yes; I had seen Miss Lenman.

Q. When and where, and what took place in reference to this matter? A. Well, probably I saw her in my office. I don't know anything special, Mr. Worthington.

Q. I simply ask if you have any recollection of anything in relation to this transaction taking place between you and either of those ladies after your conversation with Mrs. Lenman about the
54 $200,000 and the time you met Miss Lenman in your office, when the contract was signed? A. No, sir.

Q. Do you remember at any time giving Miss Lenman the advice to go to Mr. Edmonston and consult with him in reference with this matter?

A. I told Miss Lenman—I said something to Miss Lenman in regard to seeing Mr. Edmonston.

Q. What is your recollection as to whether that was before or after the contract was signed? A. It was before the contract was signed.

Q. And was it after the time when you had the conversation with the ladies about the $200,000 offer? A. I think it was.

Q. You just told us, Mr. Peak, I think, that you did not recollect having any conversation with either of them during that interval about this business? A. I did not say Miss Lenman. I said Mrs. Lenman. I think you will find that is what I said.

Q. Then if I misunderstood you, I will ask the question whether during the interval between those two times you had any conversation with Miss Lenman about this matter? A. I think I did.

Q. When and where, and what was it? A. I suppose it was in my office.

Q. You have no recollection? A. I take it for granted it was either in my office or at the house, and I think it was at my office.

55 Q. What was the conversation? A. Truly, I couldn't say, Mr. Worthington, because I really never gave it any weight at the time.

Q. Then if you cannot recall anything about what the conversation in that interval was, how can you remember that during that interval you advised Miss Lenman to see Mr. Edmonston about the matter? A. I think it was when the contract was given to Miss Lenman.

Q. Now, you evidently have something in mind that you have not told us about. A. No, I have not.

Q. When was the contract given to Miss Lenman? A. I think it was given to her the day it was signed.

Q. Where? A. I think in my office.

Q. You see, you have not told us about that. I want to know all about that. A. That is about all there is to it.

Q. You went to Mr. Lampton and repeated to him about what had occurred in reference to the $200,000 transaction, or told him something about it? A. I suppose I must have told Mr. Lampton that they would take $200,000.

Q. Of course what you suppose is not proper here. A. I take that for granted.

Q. Or even what you take for granted; but do you recall anything about what you told him about it? A. To the best of my recollection I must have told him they would take $200,000.

56 Q. Then this paper was prepared? A. Then this paper was prepared.

Q. And given to you? A. I think it was.

Q. You are not even sure about that? A. Yes; I think it was, Mr. Worthington, given to me.

Q. Then your recollection is that you gave it to Miss Lenman in your office? A. Miss Lenman.

Q. And at that time you advised her to see Mr. Edmonston? A. Yes, sir.

Q. What was your reason for referring her to Mr. Edmonston? A. I don't know. Mr. Edmonston is Miss Lenman's attorney.

Q. Did you know at that time that Mr. Edmonston was one of the board of directors of the National Safe Deposit, Savings & Trust Company? A. Yes, sir.

Mr. DARLINGTON: May I ask the significance of the last question and answer?

Mr. WORTHINGTON: I do not care to make any explanation of it except what appears on the face of these proceedings.

Mr. DARLINGTON: Then I object to it as immaterial, irrelevant and improper cross examination.

57 Redirect Examination.

By Mr. DARLINGTON:

Q. Mr. Peak, when did you first tell anybody before today that you were to get $1500 out of this? A. Before today?

Q. Yes. A. I suppose I mentioned it, Mr. Darlington, at the time.

Q. To whom? A. I suppose to Miss Lenman.

Q. That is your best recollection? A. Yes, sir.

Q. Have you mentioned it since to anybody? A. Possibly I have spoken of it.

Q. Have you spoken to Miss Lenman about it since this controversy arose, or to her counsel? A. I have no doubt I have mentioned it in a way. It was not the $1500 I was working for. It was merely as a friend.

Q. You say Mr. Edmonston was Miss Lenman's attorney? A. Yes, sir.

Q. Have you had any talk with him about this matter before today? A. Yes; I have been talking to Mr. Edmonston about it.

Q. Where? A. I have spoken to him possibly in several places, in his office, for instance, or on the street.

58 Q. How did you come to talk with him about it? A. I knew Mr. Edmonston was friendly with the family and an attorney, and it was just as anyone would speak of a matter, not with any meaning to it, in a way. Of course naturally, Mr. Darlington, I was much worried.

Q. Why? A. I don't know; because I was a party to this transaction, and naturally it would worry me.

Q. Did or did not Miss Lenman ask you to see Mr. Edmonston about it? A. No.

Q. You have been asked whether or not you are interested in the result of this case. Please state what communication with counsel for the complainant you have ever had about this case before you

were called here as a witness today? A. With Douglass and Douglass?

Q. Or myself. A. I never met Mr. Douglass until this morning.

Q. Have you had any conversation with anyone representing Mr. Douglass or myself about this case before today? A. Oh, no doubt I have, Mr. Darlington.

Q. Do you recall? A. No sir; but it stands to reason I have had conversation with them in regard to it.

Q. With counsel for Mr. Jones? A. Oh, no.

Q. My question is whether you have talked with any of the
59 counsel for the complainant? A. Oh, no. Excuse me. I did not understand you.

Q. Do you recall that about two weeks ago Mr. Sherrill, who is associated with Mr. Douglass, called on you and asked you if you would not tell him what you knew about the case? A. Yes, sir.

Q. What answer did you make? A. I told him I would see Mr. Edmonston.

Q. First. A. Yes, sir.

Q. You did see Mr. Edmonston? A. Yes, sir.

Q. Then what answer did you make? A. I told him I would not testify until I was subpœnaed.

Q. And have you lived up to that statement? A. I think I have, Mr. Darlington. I mentioned it to you this morning in a way. You asked me if I had any objection, before I was sworn?

Q. After you were subpœnaed and came as a witness I asked you if you had any objection to stating what you knew? A. Yes sir; right here. That is the only time.

Q. Did you ever object to talking to Mr. Lenman's counsel, or telling them what you knew about it, until you were subpœnaed? A. Who, Mr. Edmonston?

Q. Yes.

Mr. WORTHINGTON: By Lenman's counsel, he probably refers to me.

60 A. No sir; I never met Mr. Worthington until this morning.

By Mr. DARLINGTON:

Q. Did you object to talking to Miss Lenman's attorney, Mr. Edmonston, until you were subpœnaed, or unless you were subpœnaed? A. I have spoken to Mr. Edmonston about the case several times.

Q. You told him all you knew about it without waiting for a subpœna, did you not? A. Yes sir. Well, there is very little I know about it.

Q. How long a time elapsed between your giving Miss Lenman this contract and advising her to see Mr. Edmonston, and her returning to your office with the contract before she signed it, as near as you can recall? A. I think it was the same day.

Q. But how long a time; half a day, several hours, or what? A. I think it was in the afternoon, as well as I remember.

Q. Do you think you gave it to her in the afternoon? A. I think so.

Q. And what time did she return to your office with it? A. About half-past four, as well as I can remember.

Q. How long an interval was there between the two, as near as you can recall? A. As well as I can recall it, it was sometime
61 in the afternoon. The interval, I will say, was from one to four, or from one to four-thirty, something like that; possibly two o'clock. That is my recollection of it.

Q. Now, refreshing your recollection about this $1500 proposition, do you not recall that nothing was said between you and Mr. Lampton about his paying you anything until you told him she would take $200,000. A. Possibly so.

Q. Then he said if the matter went through, he would give $200,000 and $1,500 to you as your compensation? A. I couldn't say exactly in regard to that.

Mr. WORTHINGTON: I object to this leading examination of the counsel's own witness.

Mr. DARLINGTON: It is quite evident whose witness Mr. Peak is in this case; and, without reflecting on him at all, or his entire frankness and honesty, it is quite obvious where his inclination and bias have been.

By Mr. DARLINGTON:

Q. When did you first tell Miss Lenman you were to get $1500? A. I couldn't give you the time, but it was prior to the contract being signed.

Q. There was no secrecy about that at all? A. Not at all.

Q. What is your best recollection as to whether you ever mentioned Mrs. Lenman's name to Mr. Lampton prior to the signing of the contract?

Mr. WORTHINGTON: I object to that, because the witness has already stated his recollection on that point, both on direct and cross-examination several times.

62 A. I don't think I did.

Q. You have been cross examined about the subjects matter of your business transactions with Miss Lenman. Will you state a little more fully and in detail just what business you have transacted for her, or what the volume of it was, how long it lasted, how many transactions? A. That would be almost impossible to say, how many transactions I have had with Miss Lenman.

Q. Why? A. Just because I can't tell you that, because I don't know.

Q. Has it been a very considerable number? A. Yes.

Q. Leaving out the house;—you explained that—what were these transactions? A. Investments of funds.

Q. What sums? A. Various amounts.

Q. Ranging between what amounts, approximately? A. Ranging, I suppose, from one thousand to five or ten thousand dollars, loans on real estate.

Q. How many of these loans had you invested for her through or in connection with the firm of Early and Lampton? A. That I couldn't say, Mr. Darlington.

Q. A considerable number? A. Yes; especially through Mr. Lampton. Mr. Lampton was in business—well, they started out as Baker, Norris and Lampton, then Baker and Lampton, then Lampton, then Early and Lampton.

63 Q. And during all these occasions, you had made investments for Miss Lenman in connection with Mr. Lampton? A. Yes; I had made investments.

Q. And extending through approximately how many years? A. You mean my investment of funds for Miss Lenman?

Q. Through Mr. Lampton? A. I don't know, really, how long I have known Mr. Lampton, but I suppose—well,let me see, I suppose anyhow, ten or twelve years.

Q. And through what period have you been making investments for Miss Lenman? A. More frequently since the death of Mr. Lenman, Mr. Lenman used to attend to all those things.

Q. What transactions have you had with Mrs. Lenman on in which she was interested during these years? A. I have had business relations with Mrs. Lenman.

Q. What were they? A. They were of about the same nature, the investment of funds.

Q. Through whom did you transact business for her; directly, or through Miss Lenman? A. Sometimes direct, and sometimes through Miss Lenman.

Q. Which, in the majority of cases? A. It is hard to tell, Mr. Darlington.

Q. The reason I am asking is that you say that although you knew the mother had some interest in this property, you did not think it necessary to see her about it, but saw Miss Lenman. I want

64 to know why that was. A. I knew Mrs. Lenman had an interest in the property. As I said before, in later years I have transacted more of my business through Miss Lenman.

Q. Your business for whom? A. Well, for the estate; for the Lenman estate.

Q. You say you cannot tell who told you Mr. Jones had some interest in this contract? A. What is that?

Q. You say you cannot remember who told you Mr. Jones had some interest in this contract? A. Yes sir.

Q. Did Miss Lenman ever tell you anything on that subject? A. Miss Lenman told me afterwards.

Q. After what? A. Of course Miss Lenman mentioned Mr. Jones' name to me. She told me, but I don't know whether Miss Lenman told me first or not.

Q. About when did she tell you about Mr. Jones? A. Shortly after the contract was signed, I suppose when she first knew it.

Q. What did she tell you about Mr. Jones? A. That Mr. Jones was the purchaser.

Q. Did she tell you she had seen him and talked with him about it? A. Yes sir.

Q. Please tell as near as you can what she said to you at that interview? A. Truly, Mr. Darlington, I don't remember.

Q. Did she tell you of it at about the time the interview

65 occurred? A. I think it was the following day. What the conversation was I really couldn't say.

Q. You say Mr. Lampton told you to keep the matter quiet, and that Miss Lenman said she did not want him to go around trying to find a purchaser? A. Yes sir.

Q. Then both of them wanted it kept quiet? A. I couldn't say that Miss Lenman wanted it kept quiet. I think Miss Lenman meant by that that she didn't want the property carried around from door to door as if she was trying to dispose of the property.

Q. Is it anything unusual in your experience in dealing with property to find that the owner of a property does not want it noised about that the property is for sale? A. I never sold a piece of property, but I would not want everybody to know my business.

Q. When was it Mr. Lampton spoke to you about keeping it quiet? A. It must have been right at the very start.

Q. When was it Miss Lenman told you she did not want Mr. Lampton to be carrying the property around hunting a purchaser? A. It was after the signing of the contract, just about the time of the signing of the contract.

Q. How many times before today have you been asked about what Mrs. Lenman said? A. How many times?

66 Q. Yes. A. I don't know, Mr. Darlington.

Q. How many people have asked you about that besides the inquiries made here today? A. I don't exactly understand you, Mr. Darlington.

Q. I have been asking you today about what Mrs. Lenman said? A. Yes sir.

Q. What other people have you told that? A. I spoke to Mr. Edmonston.

Q. When? A. Well, since the matter came up, of course.

Q. How often? A. That I couldn't say.

Q. When was the last time you spoke to him about it? A. That I couldn't say. It has been quite a while ago, I think.

Q. When you went to see him about two weeks ago, after Mr. Sherrill had asked you to give us the benefit of what information you had, did you or not discuss the matter? A. I didn't say that to him then.

Q. Why was it, Mr. Peak, that you were not willing to state what you knew about this case without consulting an attorney? A. Well, I felt this way about it, that everybody seemed to be represented with attorneys, and I would like to say something myself. It is not that

67 I wanted to keep anything from you, because I made the statement to Mr. Sherrill at the time, if I was subpœnaed, no matter which side subpœnaed me, or something like that, I would tell the truth.

Q. What I want to get, if you can explain it to us, is why it was you would tell Miss Lenman's attorney all you knew about it, but required us to put you on the stand before telling what you know about it? A. Mr. Edmonston is a personal friend of mine, Possibly I would go to him because he was a personal friend.

Q. Have you ever known Mr. Coumbe to transact business for Miss Lenman except to rent the Lenman Building, or other property for her—act as rent agent? A. I don't know much about Mr.

Coumbe. I know Mr. Coumbe is the agent for the Lenman Building.

Q. The agent to collect the rents of that building? A. Oh, yes.

Mr. WORTHINGTON: I object to these leading questions of counsel's own witness.

Mr. DARLINGTON: I submit that Mr. Coumbe's connection with Miss Lenman is a matter that was brought out independently in the cross-examination. It was not responsive to anything in the direct examination, and that makes it evidence of the defendants, as to which we have a right to examine the witness at this time.

By Mr. DARLINGTON:

Q. What knowledge, if any, so far as you know, had Mr. Lampton that Mr. Coumbe represented Miss Lenman in any manner for any purpose? A. Mr. Lampton knew Mr. Coumbe was the agent of the building.

68 Q. How do you know that? A. Because Mr. Lampton is a real estate man and Mr. Coumbe is one. There is a sign up there, and he is passing in and out. He would know it just like I would know you are a lawyer.

Q. In other words, Mr. Lampton's knowledge of Mr. Coumbe's relations with Miss Lenman is simply a matter of inference with you, from the fact that his sign is on the building? A. I take it for granted.

Recross-examination.

By Mr. WORTHINGTON:

Q. When and where was it that you told Miss Lenman you were to receive $1500 if this transaction went through, Mr. Peak? A. Where, I couldn't say; but it was prior to the signing of the contract.

Q. Was it before or after your visit there when the conversation was had about the $200,000? A. I couldn't say that, Mr. Worthington. I don't remember. But I know it was some time when the figures were reaching the sum of $200,000, some time near when the $200,000 was offered. It must have been at that time. Otherwise he would not have named the sum of $1500, possibly. It must have been about that time.

Q. You seem to be reasoning around instead of giving your recollection. Do you think you recollect? A. You know it is a

69 very hard thing to remember things back a couple of years. It is a very difficult thing.

Q. I know that, and I am trying to find out how positive you are that you told Miss Lenman you were getting compensation, or were to get compensation from the other side in this matter. A. I am positive I told Miss Lenman I was to receive $1500; but when it was, it was very hard to say.

Q. Have you any recollection as to whether any other person was present when you told her that? A. No sir; I have not.

Q. Did you ever tell Mrs. Lenman that? A. I don't know that I did.

Q. Did you tell Miss Lenman more than once that you were to get $1500 out of the case if the $200,000 sale went through? A. That I can't remember.

Q. You say you told Mr. Edmonston that. When did you first tell Mr. Edmonston you were interested in the matter to the extent of $1500? A. It must have been after the contract was signed.

Q. How long after, according to your recollection? A. Sometime within a week, I suppose.

Q. I want to ask you again, in view of the re-direct examination, what is your recollection as to what you told Mr. Lampton when you first saw him after you had had this conversation in which Mrs. Lenman had said that she would sell for $200,000? You had
70 been up there and had this conversation, and you went to see Mr. Lampton about it, I suppose. A. Yes sir.

Q. What did you say to him? A. I don't remember what I said, but I must have told him they would take the $200,000, that the offer was accepted.

Q. You say you must have told him? A. Yes, I must have, but I don't remember.

Q. Have you any recollection as to what you said to him? A. No sir; I have not.

Q. How is it you undertake to say you do not think you told him about having any talk with Mrs. Lenman at all, and you cannot remember anything that took place? How can you remember you did not tell him what did take place? A. I don't remember telling Mr. Lampton that, Mr. Worthington.

Q. But you have said you do not think you did tell him; that that is your recollection? A. I do not.

Q. There is a great difference between saying you cannot say you told him and saying your recollection is that you did not tell him. A. I don't remember telling Mr. Lampton.

Q. Is that as far as you can go? A. Yes sir.

Q. Was there any reason in your mind for concealing from him the fact that you understood Mrs. Lenman had an interest in
71 this property, and that you had talked with her and got authority from her and from her only? A. I got my authority from Miss Lenman.

Q. Have you not said Mrs. Lenman was the only person who said the sale would be made for $200,000? A. Mrs. Lenman said she would take $200,000. I think shortly after that she left the room.

Q. You have said Miss Lenman did not say anything on that subject?

Mr. Douglass: He said at that time she did not.

A. Our conversation, Mr. Worthington, was started prior to Mrs. Lenman's coming in the room. It is a very difficult thing—it is not that I want to—I am trying my very best to refresh my memory.

Q. I think we all agree about that. A. It is a very difficult thing to remember back something you did not expect to testify to.

Q. Did you not state to me when I first examined you that Miss Lenman said nothing about selling for $200,000? A. Yes sir.

Q. That is true, is it not? A. Yes sir.

Q. And that Mrs. Lenman said she would. A. Yes sir.

Q. Is there any reason why you should have gone to Mr. Lampton and told him about what had taken place, without letting him know the acceptance of the offer was from Mrs. Lenman and Mrs. Lenman only?

Mr. DARLINGTON: Do I understand counsel is now waiving his objection to having the witness reason out things instead of giving his recollection of what occurred?

72 Mr. WORTHINGTON: I do not care to enter into any argument with counsel on that point.

A. No; there is no reason.

Q. You have been asked about your conversations with Miss Lenman in reference to Mr. Jones having an interest in this matter, and you said, as I understand you, that Miss Lenman told you just about the time she learned it. Did she tell you from whom she had learned that Mr. Jones had something to do with this transaction? A. Miss Lenman told me she saw Mr. Jones.

Q. Did she tell you from whom she got the information that Mr. Jones had anything to do with it? A. That I don't remember.

Q. When you went to see Mr. Edmonston about two weeks ago, did you go to consult him as a counsel or as a friend? A. More as a friend.

LOUIS R. PEAK,
(By the Examiner, by Consent.)

Subscribed and sworn to before me this — day of —— 1906.

—— ——.

The further taking of these depositions was thereupon adjourned, subject to notice.

73 WASHINGTON, D. C., *November* 17, 1906—
10:45 o'clock a. m.

Met pursuant to notice at the office of Douglas & Douglas, Colorado Building, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Douglas.

Present on behalf of the defendants, Mr. Worthington.

JAMES J. LAMPTON, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined.

By Mr. DARLINGTON:

Q. Mr. Lampton, you are a member of the real estate firm of Early & Lampton? A. I am.

Q. How long have you been in the real estate business? A. Twelve years.

Q. In Washington? A. In Washington.

Q. Do you know Mr. Louis R. Peak, who testified at the last session? A. I do.

Q. How long have you known him? A. About ten years.

Q. How long, if at all, have you had business transactions
74 through him with Miss Lenman? A. For about ten years.

Q. Prior to this real estate contract, what had been the nature of those transactions? A. I had negotiated loans through Mr. Peak for Miss Lenman.

Q. Please tell us what led up to the negotiation by you for the purchase of the Lenman Building? A. Some time in April, 1905, I began negotiating through Mr. Peak with Miss Lenman for the Lenman Building.

Q. Why did you begin those negotiations with Mr. Peak? A. I had an inquiry for large properties in the northwest.

Q. My question is why did you go to Mr. Peak about the Lenman Building? A. Knowing that Mr. Peak was the financial representative of Miss Lenman.

Q. Just tell us in your own way, concisely and fully, the history of this negotiation from the time you took it up with Mr. Peak. A. I began with an offer, I think, of $90,000, and ran it up to $180,000, which was declined by Miss Lenman. Mr. Peak said that he had seen Miss Lenman and that Miss Lenman would not take less than $200,000 net for the Lenman building.

Q. What did he say, if anything, about her willingness to take that sum? A. He said she was willing to take $200,000 net
75 for the building.

Q. What did you do? A. I went to my office and consulted with my partner, Mr. Early, and drew a contract.

Q. What was the result of your conference with Mr. Early? A. We decided to purchase the Lenman building for $200,000 net.

Q. Very well. A. I drew the contract and gave it to Mr. Peak to take to Miss Lenman. I went to his office about 12 o'clock, as he generally called by Miss Lenman's on his way to lunch, and asked him to have the contract ratified by Miss Lenman. I went back, or called him up, about 2, and went down to his office at about 4, and he informed me that Miss Lenman was in *fonference* with her attorney over the matter. I called back again at about 5, waited for a few minutes, walked around the block, came back, and in about ten minutes Miss Lenman came in. She and Mr. Peak were back in the private office of the Corcoran Fire Insurance Company Building on 11th street. They held a conference for some minutes and called me back, and Miss Lenman said "I presume you want this contract." I said "Yes," and we discussed——

By Mr. WORTHINGTON:

Q. Did you say Mr. Peak or Miss Lenman said that? A. Miss Lenman said it. We discussed matters.

By Mr. DARLINGTON:

Q. Just state what was said. A. Mr. Peak said "Mr.
76 Lampton, I have spoken with Miss Lenman about the $1500 which I am to receive." Miss Lenman said "Yes; I understand Mr. Peak is to receive $1500 from Early & Lampton at the completion of this sale."

Q. What other conversation, if any, took place between you and Miss Lenman on that occasion? A. Miss Lenman said "Mr. Lampton, I would rather you would not hawk this property around," and I replied that I would not.

Q. Then what happened? A. I took the contract and went back to the office.

Q. Please look at Exhibit A, filed with the original bill in this cause, and state whether or not that is the paper you have referred to as the contract? A. This is the paper, and the paper which Miss Lenman handed me, signed by her.

Q. I find the names Early & Lampton signed in two places on the contract. In whose handwriting are those signatures? A. Early & Lampton; in both places, are in my hand-writing.

Q. I also find the name Fannie E. Wilhoite in two places on the contract. In whose handwriting is that signature? A. I signed Fannie E. Wilhoite, per E. & L. Fannie E. Wilhoite signed the other.

Q. The purple signature is signed by whom? A. That is Mrs. Fannie E. Wilhoite's signature.

Q. Are you familiar with her signature? A. I am.

77 Q. In what way have you become familiar with it? A. Mrs. Wilhoite is a client of ours. She rents from us an apartment.

Q. In that connection, how have you become familiar with her signature? A. Seeing her often write her name to different papers.

Q. While we are on that subject, please look at Exhibit B, filed with the original bill, and state in whose handwriting is the signature Fannie E. Wilhoite? A. That is in Fannie E. Wilhoite's handwriting.

Mr. WORTHINGTON: What is that, I have forgotten?

Mr. DARLINGTON: That is the promissory note.

By Mr. DARLINGTON:

Q. Please look at Exhibit C, which is the deed, and state in whose handwriting is the signature of Fannie E. Wilhoite to that paper? A. That is in Fannie E. Wilhoite's handwriting.

Q. How did Mrs. Wilhoite's name come to be used in this transaction. A. We sometimes use our client's names in the purchase of property.

Q. With or without their previous knowledge? A. Of course with their knowledge.

Q. In this instance had you Mrs. Wilhoite's authority? A. We had Mrs. Wilhoite's authority.

Q. At what stage of the negotiation did you come into
78 communication with the complainant, Thomas R. Jones? A. few days before the signing of that paper by Miss Lenman.

Q. The paper you call the contract? A. Yes, sir.

Q. How did it come about? A. I called on Mr. Jones to ask his value of the Lenman building, and he gave me what he considered a proper price for the Lenman Building.

Q. Did anything else occur between you and him at that time?

A. Mr. Jones at that time said to me that if I secured the property within a reasonable price, running from $175,000 to $200,000, to please let him know before we made any disposition of the property.

Q. When did you next see Mr. Jones? A. I next saw Mr. Jones the morning after the signing of that contract.

Q. What took place on that occasion? A. I said to Mr. Jones that we had purchased the property and asked if he cared to buy the property from us. He asked the price. I named the price, and he agreed to the price and the terms.

Q. I show you a paper bearing date May 2, 1905, and ask you in whose handwriting are the signatures Early & Lampton, Agents for F. E. Wilhoite, F. E. Wilhoite and Thomas R. Jones—the four signatures? A. Early & Lampton is in Charles Early's hand-
79 writing. F. E. Wilhoite is in Mrs. Wilhoite's handwriting. Thomas R. Jones is in Mr. Jones' handwriting.

Q. In whose handwriting is the signature F. E. Wilhoite immediately under Early & Lampton? A. In Charles Early's handwriting.

Q. In whose handwriting is the endorsement on the back of this paper, signed Early & Lampton, and witnessed on behalf of Thomas R. Jones by William D. Hoover? A. That signature is in my handwriting.

Q. That was the endorsement extending the time within which Mr. Jones would agree to purchase?

Mr. WORTHINGTON: Does not that speak for itself?

Mr. DARLINGTON: It does. I am identifying it.

By Mr. DARLINGTON:

Q. How did that extension come to be made? A. Mr. Jones notified us it would be impossible to have the Title Company's report ready within the time specified in this contract.

Mr. DARLINGTON: I offer in evidence Exhibits B, C and D, filed with the original bill, Exhibit A having been offered in evidence at the last session, if I remember correctly.

I also offer in evidence the paper about which the witness has last testified.

Said paper is filed herewith, marked Exhibit E.

By Mr. DARLINGTON:

Q. Mr. Lampton, please tell us how this $1500 arrangement came about between you and Mr. Peak—how and when it came
80 about? A. When the $180,000 offer was made to Miss Lenman and was declined, and Mr. Peak came back stating that Miss Lenman was willing to take $200,000 net for the property, Mr. Peak and I discussed the matter of the amount which he was to receive, and we agreed upon $1500 which was to be paid him.

Q. Paid him by whom? A. By Early & Lampton.

Q. Mr. Peak testifies that when you undertook this negotiation with him for the purchase of this property, you asked him to keep it quiet. Do you recall that? A. I think I asked him to keep it quiet.

Q. Why? A. For the reason that if we were to purchase the property, there might be other people who would probably make an offer on it, too.

Q. I notice in this Exhibit E, your contract with Mr. Jones, the terms were all cash, while your agreement with Miss Lenman was $50,000 cash and the balance in three years. What is the explanation of that variation? A. Mr. Jones preferred to pay all cash, and I thought I could arrange with Miss Lenman to accept the entire amount in cash.

Q. What happened? Was that arrangement made—all cash? A. No; the arrangement was made for the deed of trust as it calls for here, for the $150,000, and Mr. Jones agreed to that.

81 Cross-examination.

By Mr. WORTHINGTON:

Q. You say Mr. Jones had agreed, after this contract with him was entered into, that his contract should be made in the same way? A. In accordance with the contract.

Q. In accordance with your contract? A. In accordance with the contract with Miss Lenman.

Q. Except, of course, the $13,250. That was to be added to the cash payment? A. Yes, sir; that was to be added to the cash payment.

Q. Mr. Jones, of course, did not tell you anything about where that $63,250 cash payment was to come from? A. He did not.

Q. Until this transaction, had you ever known Mr. Peak to have anything to do as representing Miss Lenman or her mother in selling real estate? A. Not in the sale of real estate.

Q. Had you known of anybody representing them, or either of them in sales of real estate? A. I had not.

Q. You know Mr. Coumbe, of course? A. I do.

Q. And you knew him then? A. I did.

Q. You knew he was the agent of this particular property, in charge of the collection of the rents and the care of the
82 building? A. I knew he was the agent for that building, for the collection of the rents.

Q. Did you say anything to Mr. Peak about not letting Mr. Coumbe know anything about this negotiation? A. I did not.

Q. You are sure about that? A. I am sure.

Q. You say you had had an offer from somebody for the purchase of property in the northwest? A. I had.

Q. And it was that led up to this negotiation? A. It was.

Q. Who was the person who made the inquiry for property in the northwest, to whom you refer? A. I had several persons who were negotiating for large properties in the northwest.

Q. Was there any one of these inquiries, or any of them, that had anything to do with your starting in on this Lenman Building? A. Yes.

Q. Was it one of them or two of them or all of them? A. More than one.

Q. Which ones? A. Do you want me to give the names of the clients?

Q. Yes; that is just what I want. A. I had made some large sales in the northwest and knew that one or two real estate purchasers were in the market for a large property in the northwest.

83 Q. I have understood you to say that, but I am asking you who they were? A. One was Mr. Arthur Jordan. Shall I give the others?

Q. Yes; I want all of them whose conversations with you in any wise suggested to you to go after the Lenman building. A. None save Mr. Jordan specified any specific building.

Q. Did he specify this building? A. I talked with him about this building.

Q. When did you have your talk with him? A. Some time prior to these negotiations.

Q. How long prior? A. I don't remember just how long.

Q. About? A. Probably six weeks before.

Q. Where did you have that talk with him? A. In our office.

Q. Did you have more than one conversation with him in which the Lenman building was mentioned? A. I don't think we did.

Q. What was your conversation about the Lenman building at that time? A. I suggested that the property west of 9th street, north of Pennsylvania Avenue, south of H street and east of 18th street, business property, would be a good investment.

Q. You have not yet told us what took place between you and him with reference to the Lenman building. That is what I am

84 asking about. A. And I suggested if he would buy any property within those bounds he would reap a good reward on his investment. He had made me an offer on other properties in the northwest.

Q. Was there any conversation between you and him specifically about the Lenman building? A. Yes; I suggested that he purchase the Lenman building.

Q. That is what I am asking about. Just tell me all that took place between you and him in reference to the Lenman building in that conversation. I understand you only had one. A. I suggested if he would buy the Lenman building he would get a great return on his investment.

Q. You told him that without knowing what you would have to pay for it, did you? A. I told him if he could buy it within a certain given price.

Q. What price did you mention? A. We started out, I think, at $150,000. I discussed with him the advisability of buying anywhere from $150,000 to $200,000.

Q. And you told him if he would buy it anywhere between those figures he would have a good return on the investment? A. I did.

Q. Did you know what it rented for at that time? A. I did not.

Q. Where is this gentleman now? A. He is in Indiana.

85 Q. Did you subsequently have any conversation with him in reference to anything, either before or after the contract with Miss Lenman was entered into? A. Since the contract was entered into with Miss Lenman I have not.

Q. Did you have any before, except the one you have told me about? A. Not except that one.

Q. It was his inquiry that suggested to you to see what the Lenman building could be purchased for? A. Early & Lampton had purchased buildings in the northwest. They had purchased them themselves and had sold them at an advanced price.

Q. Had this conversation with Mr. Jordan anything to do with your going to see Mr. Peak about the Lenman building? A. It had something to do with it.

Q. What? A. It had to do with it, that I thought if we could buy the Lenman building at a proper price, we could sell it at an advance to Mr. Jordan?

Q. To Mr. Jordan? A. To Mr. Jordan or other would-be purchasers.

Q. He had agreed, had he, that he would take the property if you would buy it between $150,000 and $200,000? A. He had never agreed to take the property at any price.

Q. But you had suggested to him that if he could get it at
86 $200,000 or under, it would be a good investment? A. I had.

Q. And he had authorized you to look for investments in the northwest for him? A. He had not authorized me to look for investments for him.

Q. Why did you not go to him after you got this contract with Miss Lenman and let him know that the property was available? A. For the reason that after my talk with Mr. Jones I was convinced that I could sell the property at an advance to Mr. Jones.

Q. How soon did you see Mr. Jones after the contract with Miss Lenman was signed? A. Not until the next morning.

Q. The contract was signed late in the afternoon, I believe. A. About half past 5.

Q. How early the next morning did you see Mr. Jones? A. I think about 10 o'clock. I am not sure.

Q. At the beginning of business hours, then? A. I think so.

Q. You say you had not seen Mr. Jones about this Lenman building before? A. I said I had seen him.

Q. When? A. I called on Mr. Jones and asked his valuation and advice about the property.

Q. How long was that before the contract with Miss Len-
87 man was signed? A. Some days, I think.

Q. You have not told us what Mr. Jones said about the value. A. Yes, I did.

Q. What did he say? A. I said he said the property was worth from $175,000 to $200,000.

Q. Did he say anything as to whether he or anybody else would like to buy it at that price? A. He said if I could get it within those figures, before I disposed of it, to let him know.

Q. Did he say whether he wished to know in his own interest or in behalf of the company which he represented? A. He did not.

Q. So the morning after the contract with Miss Lenman was signed, you went to Mr. Jones? A. I did.

Q. What took place when you saw him? A. I went to Mr. Jones and I stated that I had the contract signed by Miss Lenman, and

stated to him that I could sell it to him at a price. After figuring for awhile, Mr. Jones said "I will take the property."

Q. At what price? A. At the price named in the contract, which he made.

Q. You then and there told him you would sell it to him for $213,250? A. Yes, sir.

88 Q. And he said he would accept the proposition? A. He did.

Q. Was there anything said at any time between you and Mr. Jones in reference to his wanting this property for the National Safe Deposit, Savings & Trust Company of the District of Columbia? A. There never was.

Q. Not a word? A. No, sir.

Q. So far as you are concerned, he wanted this for himself and not for the company? A. So far as I know, he wanted it for himself.

Q. When did you first have any conversation with Mrs. Wilhoite about the Lenman building? A. Some days prior to the signing of the contract by Miss Lenman.

Q. What occurred? A. We notified Mrs. Wilhoite that we were in negotiations for a large property, and asked her if we might use her name. She said we might.

Q. Had you used her name in any similar transaction before that? A. We had.

Q. Do you compensate her or agree to compensate her for using her name in this way? A. Sometimes.

Q. Did you in this instance? A. We have not.

Q. You did not agree to compensate her and you have not
89 compensated her? A. There was no agreement made.

Q. She had no real interest in this transaction? A. None except save to take the property for us.

Q. I say she had no real interest. She was acting for you? A. She was.

Q. Entirely? A. Yes.

Q. Why did you use a dummy? A. For the reason if Early & Lampton had a contract of sale for that property, it would be harder to get an advance price than it would be in an outside name. That is usually done in the business.

Q. Why is it harder to get an advance price for a title that is in Early & Lampton than for one that is in Mrs. Wilhoite? A. I don't know that it would be harder.

Q. The reputation of your firm for shrewdness, I suppose, would lead people to think you had not paid any more for the property than it was worth? A. That might be so.

Q. It would not be that people would think you had been smart enough to get the property for less than it was worth?

Mr. DARLINGTON: I object to this line of examination as not called for by any evidence, and certainly as not material to any issue in this case.

By Mr. WORTHINGTON:

Q. Your firm has no interest in this matter now except to
90 see that the sale is carried through to Mr. Jones and that you get your $13,250 profit? A. Early & Lampton purchased the property intending to carry out that contract.

Q. I understand that you purchased the property for $200,000 and that you sold it to Mr. Jones for $213,250, that is, at a profit of $14,250. I ask you whether you have any further interest in the matter than to make that profit of $13,250? A. We are under contract to deliver that property to Mr. Thomas R. Jones.

Q. Any contract except the one in evidence? A. None except the one that is in evidence.

Q. Which has been marked Exhibit E? A. I do not know what it has been marked.

Mr. DARLINGTON: We agree it has been marked Exhibit E.

By Mr. WORTHINGTON:

Q. Mr. Lampton, you have stated that Mr. Early and yourself determined to buy this property. Is that so? A. It is.

Q. When you entered into this contract, then, you expected your firm would be the purchaser? A. We did.

Q. Had you made any arrangements about raising the money? A. I had.

Q. Had you made arrangements to raise the $50,000 cash
91 price? A. I had.

Q. What arrangements? A. With Mr. Early, who could have easily raised the $50,000.

Q. Do you know, in fact, what arrangements he had made? A. I know that Mr. Early and I had agreed to purchase the property, and Mr. Early, of the firm of Early & Lampton was to furnish the money.

Q. You do not know what arrangements he had made then? A. I do not.

Q. He is alive and here, is he? A. He is.

Q. He was to raise it all, was he? A. He was, all of the $50,000.

Q. I mean all of the $50,000 cash payment required? A. Yes.

Q. When you first went to see Mr. Peak about this business, did you then say anything to him about his compensation if he brought about a sale? A. I don't think I did.

Q. Had anything on that subject taken place between him and you before the subject was mentioned on the day the contract with Miss Lenman was signed? A. I think not.

Q. So far as you know, then, up to that time he did not expect to receive anything? A. Not from me.

92 Q. When this contract was in fact executed—Exhibit A, I mean,—the contract with Miss Lenman, did you have any purchaser of the property in mind except Mr. Jones? A. No definite person.

Q. Had you any intimation in anywise that Stilson Hutchins would take the building? A. No intimation directly to me.

Q. Did you say anything to Mr. Peak in regard to Mr. Hutchins? A. I did.

Q. What did you say to him? A. I said that Mr. Hutchins would exchange—this conversation with Mr. Peak about Mr. Hutchins was prior to the signing of the contract—that Mr. Hutchins desired to exchange some property which he had for the Lenman building and pay the residue in cash.

Q. Was that after you had first spoken to Mr. Peak on the subject, or at the conversation when you first spoke to him? A. That was after I had first spoken to him that this offer was made.

Q. In the meantime, had you seen Mr. Hutchins? A. I have never seen Mr. Hutchins.

Q. In the meantime, had you had any communication with him, you or your firm? A. Indirectly; yes.

Q. How indirectly? A. We had had a tentative offer to exchange some property at 14th and Massachusetts avenue for
93 the Lenman building and to pay a certain amount in cash difference.

Q. A tentative offer from whom? A. From Mr. Hutchins.

Q. Through whom? A. Through Mr. Bradford.

Q. Did Mr. Bradford communicate with you on the subject, or Mr. Early, or some other person in the office? A. He communicated with me directly.

Q. Did you in anywise inform Mr. Peak or suggest to him before the contract with Miss Lenman was signed that Mr. Hutchins was the person for whom you were negotiating with Miss Lenman through Mr. Peak? A. In the beginning; yes.

Q. I understood you to say you had spoken to Mr. Peak on the subject before you had got this indirect communication from Mr. Hutchins. Is that right? A. No; you are mistaken in that.

Q. You had had this proposition from Mr. Hutchins before you spoke to Mr. Peak at all? A. No; I submitted the proposition from Mr. Hutchins to Mr. Peak.

Q. Then you had the proposition from Mr. Hutchins before you first spoke to Mr. Peak about the Lenman building. A. Yes.

Q. How long before you first spoke to Mr. Peak on the subject? A. I don't remember just the length of time.

Q. Was Mr. Hutchins' communication or proposition in
94 writing? A. It was not.

Q. It was a verbal communication made by Mr. Hutchins himself? A. Not to me.

Q. To whom? A. To Mr. Bradford.

Q. You only know about Mr. Hutchins' proposition, then, from what Mr. Bradford said to you? A. Through Mr. Bradford.

Q. Now, what did he say? A. He offered the corner of 14th and Massachusetts avenue and so much cash for the Lenman building, which I submitted to Mr. Peak to be submitted to Miss Lenman, which was declined.

Q. The northeast corner of 14th and Massachusetts avenue and M street, as it comes in there.

Q. Mr. Hutchins' proposition through Mr. Bradford to you was to

give that property and how much cash for the Lenman building? A. I don't remember how much the cash payment was.

Q. Then you went to Mr. Peak, and did not tell Mr. Peak when you first spoke to him on the subject that Mr. Hutchins had made this proposition? A. I submitted that proposition to Mr. Peak.

Q. And he reported that proposition, you say, to Miss Lenman, or undertook to? A. So he informed me.

Q. And afterwards informed you it was declined? A. Yes.

95 Q. Did you after that time give Mr. Peak to understand in any way that you were acting for Mr. Hutchins any further? A. I don't think I did.

Q. Did you at any time during the negotiations say to Mr. Peak, or intimate to him in any way, that there was occasion for dispatch in this business because Mr. Hutchins was about to go to Europe? A. I did. That was the proposition to which I have just referred.

Q. You did not intimate anything of that kind after Mr. Peak had reported that Miss Lenman had declined that proposition? A. There were several propositions made back and forth between Mr. Hutchins, through me, to Mr. Peak. Each one was declined.

Q. How long before the contract in evidence with Miss Lenman was signed was the last proposition in that regard declined? A. I don't remember how long it was.

Q. About? A. These negotiations were running along probably for a month or six weeks.

Q. About how many days before the contract with Miss Lenman was signed was it that the Hutchins property was no longer considered because Miss Lenman declined it? A. Some days. I don't remember how many days.

Q. Would you say it was a week? A. I should say it was a week.

96 Pending the further examination of this witness, the further taking of these depositions was adjourned subject to notice.

WASHINGTON, D. C., *December* 10, 1906—3:30 o'clock p. m.

Met pursuant to notice at the office of Joseph J. Darlington, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Douglas.

Present on behalf of the defendant, Mr. Worthington.

JAMES J. LAMPTON, resumed the stand for further cross-examination.

By Mr. WORTHINGTON:

Q. Mr. Lampton, did you see Mr. Coumbe on or about the day that the contract which was sought to be enforced in this suit was signed by Miss Lenman? A. No; I saw him after the contract was signed.

Q. How long before the contract was signed was the last time you

saw him, according to your recollection? A. You mean in reference to this matter?

Q. Yes, in reference to this matter. A. I never saw him in regard to this property until after the contract was signed with Miss Lenman.

97 Q. And how soon after the contract was signed did you see him? A. I think two days afterward.

Q. Where did you see him? A. In his office.

Q. Did you at that time say to him anything about Mr. Hutchins? A. I don't think I did.

Q. You are not sure? A. I am not sure, but I don't think I did.

Q. I will ask you whether you did not tell him, in substance, that the matter should be put through speedily because Mr. Hutchins was about to sail for Europe? A. Mr. Coumbe?

Q. Yes. A. No, sir, I did not.

Q. Did you say anything to that effect to him at his office at any time along about this time, either before or after the contract was signed? A. No; I did not.

Q. Mr. Lampton, I will ask you whether on or about May 1, 1905, at Mr. Coumbe's office, you did not say to him this in substance, after asking him what the total income of the house was—— A. Was this before or after the signing?

Q. On May 1st, just before the signing of the paper; but I say on or about that date—that you were negotiating a sale and that Mr. Hutchins was about to go away. Is that so? A. I did

98 not.

Q. Did you, a day or two after that, go in and say you had sold, and wanted the leases? A. I did not. I said I would like to look at the leases.

Q. Did you say to him, on or about one or two days after the first of May, or about that time, at his office, to hurry things up because Hutchins was going away in a day or two? A. I did not.

Q. Did he tell you, after the contract for sale had been signed, what the income of the property was? A. I think he showed me one or two monthly statements of the rent of the property.

Q. How long was that after the contract was signed? A. Two days, I think.

Q. Was that in his office? A. That was in Mr. Coumbe's office.

Q. Did you at that time, after he had shown you those papers or given you that information, tell him you would tell Hutchins, the purchaser, who was about to go to Europe? A. That Mr. Hutchins was the purchaser?

Q. Yes. A. No, sir; I did not.

Q. Nothing like that happened? A. No, sir; not as to Mr. Hutchins.

Q. Did you say anything to him about anybody going to

99 Europe, and that that was the reason for hurrying up? A. No, sir.

Q. I will ask you whether, at the time you met Miss Lenman in Mr. Peak's office, was it, when the contract was signed? A. It was.

Q. Whether you said to her in substance on that occasion that

your partner did not know anything about the matter? A. I did not.

Q. Did you say that your partner did not know anything about the matter, but he would have to pay his half of the hundred dollars represented by the check which you were giving her then? A. I did not.

Q. Did you, at that time, say in substance that "my party is a very peculiar man, and if any word of this goes out, the whole affair will be off"? A. I don't think I did.

Q. You are not sure? A. Miss Lenman said that she would rather I would not hawk the property around, and I said to Miss Lenman I would rather she would not state the price, because if I made a profit, I would have to get over and above the $200,000 net which she had agreed to sell it to me for, and she said she had no objection whatever to any amount I might get over and above the $200,000 net to her.

Q. I understand you have already testified to that in substance. My question is whether you said to her at that time, in sub-
100 stance, "my party is a very peculiar man, and if any word of this goes out, the whole affair will be off"? A. I don't think I did.

Q. You are not sure, then? A. Yes, I am sure that I did not say to Miss Lenman that "my party is a very peculiar man, and if it gets out the deal will be entirely off."

Q. The question is whether you said that in substance, not the exact words? A. I did not.

Q. Who was your party at that time? A. I had no party at that time except Early & Lampton. Early and Lampton were purchasing at that time.

Q. You did not say anything with regard to representing somebody else? A. I said to Miss Lenman not to say anything about the price of $200,000 net; that if I sold it I would have to get my profit over and above the $200,000 net, which she agreed to.

JAMES J. LAMPTON,
(*By the Examiner, by Consent.*)

Subscribed and sworn to before me this — day of —— 1906.

——— ———,
Examiner in Chancery.

101 JOSEPH J. DARLINGTON, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined.

By Mr. DOUGLAS:

Q. Mr. Darlington, you may state your connection with this transaction, commencing with the matter of the tender at the office of the Columbia Title Company. A. Mr. Edmonston made an appointment with me at which he would have the defendant, Miss Isobel Lenman, at his office to receive tender, it being the 25th of May, as I remember it, 1905. I am quite sure that was the date. I accordingly went to Mr. Edmonston's office at the hour named, accom-

panied by Mr. Jones, Mrs. Wilhoite, Early and Lampton and Mr. Douglas, who was also counsel in the case. We were introduced to Miss Lenman by Mr. Edmonston. I told him we had come for the purpose of tendering Miss Lenman, through him, or personally if she preferred, $50,000 in United States legal tender notes, being the agreed cash payment for the purchase of the property described in the bill; also Mrs. Wilhoite's note for $150,000, payable in three years, with interest at 4-1/2 per cent. per annum, payable semi-annually.

Q. Is this the note (exhibiting a paper to the witness)? A. It is Exhibit B, with the bill. That is the note in question. Also a deed, Exhibit C, I think, with the bill, to be executed by Miss Lenman, conveying the property to Mr. Jones.

102 Q. Is this the paper here (indicating)? A. Yes, it is an exhibit to the bill. Also a deed of trust from Mr. Jones and his wife to secure this Wilhoite note on the property. I explained to him that the latter draft was not complete, that the names of the trustees had been left blank so that Miss Lenman might choose the trustees if she wished, but that Mr. Jones and his wife were ready to execute the trust to any trustees whom she might name. I further called his attention to the fact, in the presence of Miss Lenman, that the deed from Miss Lenman to Mr. Jones had already been executed by Mrs. Wilhoite, as evidence of the fact that she had transferred the contract to Mr. Jones. Mrs. Wilhoite was present and assenting to my statements in regard to her connection with the matter—that is, assenting by acquiescence. She said nothing. Mr. Edmonston said they would waive the counting of the money, which I exhibited to them, as he had no doubt it was $50,000; that they would examine the papers. Thereupon he took the promissory note, the draft of the deed from Miss Lenman to Jones, and the draft of the deed of trust, and he and Miss Lenman together left the room. They returned in a little while, when Mr. Edmonston said that Miss Lenman would accept the tender as sufficient, but would decline to consummate the transaction. I inquired whether this was because of any objection to the form of the papers which we could correct. He said the objection was not to the form of the papers but to their scheme. I said to him that the papers had been prepared by the vice-president of his company, Mr. Becker, as I understood it, but if he would let me know what the objection to the scheme of the papers was,

103 we would see if we could correct that. He said they objected to the fact that the transaction was not entirely with Mrs. Wilhoite. I then said "Mrs. Wilhoite is here. We will reform the papers and make it a transaction exclusively with her, conveying the property to her and taking a deed of trust from her." Mr. Edmonston said that Miss Lenman would not execute any deed that did not recognize her mother's rights in the property. I told him if he preferred an express recognition of the mother's dower rights in the property, we would insert that. He said she would sign no paper which would not recognize a life interest in the property in her mother. I told him we could not concede that, and asked him whether, in view of that objection, it was desired that we should recast the papers, and make Mrs. Wilhoite the sole party to the trans-

action. He said that would be unnecessary, as Miss Lanman would execute no paper that did not recognize a life interest in the property in her mother. Then we came away.

Mr. DOUGLAS: I offer in evidence exhibits B, C and D with the bill.

Cross-examination.

By Mr. WORTHINGTON:

Q. Mr. Darlington, was there anything said there in the way of indicating that Early and Lampton were the purchasers of the property? A. No; not that I recall.

Q. Have you any objection to stating from what source you derived the $50,000 with which you made the tender of the
104 cash? A. None in the world. I got it from Mr. Jones. He brought it to my office .

Q. He brought it in cash? A. Yes; in fifty $1,000 bills, United States legal tender.

Q. You of course do not know where he got it except by hearsay? A. No; except by hearsay.

J. J. DARLINGTON.
(By the Examiner, by Consent.)

Subscribed and sworn to before me this — day of——, 1906.

——— ———,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned, subject to notice.

105 *Testimony on Behalf of Defendants.*

Filed July 11, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 25493.

THOMAS R. JONES
vs.
ISOBEL H. LENMAN ET AL.

WASHINGTON, D. C., *February* 19, 1907—1:30 o'clock p. m.

Met pursuant to agreement at No. 1100 Twelfth Street northwest, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Douglas.

Present on behalf of the defendant, Mr. Worthington.

JEANNETTE R. LENMAN, a witness of lawful age, called by and — behalf of the defendant, having been first duly sworn, is examined.

By Mr. WORTHINGTON:

Q. Please state your full name. A. Jeannette R. Lenman.

Q. What was your husband's name? A. John Thomas Lenman.

Q. When did he die? A. In 1892.

106 Q. He left no will, I believe? A. No.

Q. Miss Lenman, who is here present, is the daughter of you and your husband? A. Yes.

Q. Was there any other child of the marriage? A. No.

Q. Do you know Mr. Louis R. Peak? A. Yes.

Q. Do you remember having any conversation with him in reference to a proposal or offer for the building involved in this suit, known as the Lenman building, on New York Avenue, in this city? A. Yes, sir; he told me he had an offer for it.

Q. Tell us, in your own way, all that took place. A. I was busy in the morning, and he came into the room where I was. He said: I have an offer for the Lenman Building." I said: "Have you?" He said: "Yes, I have got an offer of $160,000"—or $180,000; I do not remember now which. I said to him: "Well, Mr. Peak, I would not take anything less than $200,000 net." He said: "Very well, Mrs. Lenman; you will never get it." That ended the conversation.

Q. Did that occur in this house where you are living? A. It occurred in this house, in the room below.

Q. That is the room you call the south parlor, is it? A. Yes, sir.

Q. Did you see him when he first came into the house?

107 A. No, sir.

Q. Where did he go? A. Into the north parlor.

Q. Who was there. A. My daughter.

Q. Did you hear what took place between them before they came into the room where you were? A. No.

Q. Do you remember whether your daughter came in with him? A. No; she did not come in with him. He came in by himself.

Q. Did you have any conversation at any other time with Mr. Peak, with reference to any offer for this property? A. Never. Probably he may have joked about it, but nothing to remember.

Q. Nothing serious? A. No.

Q. Do you remember when that was? A. I think it was about the 2d of May, as well as I recollect.

Q. Will you tell us whether anything took place, after the death of your husband, between you and your daughter, with reference to the Lenman Building, and whose property it should be?

Mr. DARLINGTON: I object to any testimony by the witness

108 as to conversations with her daughter about the property, upon the ground that the same are incompetent to affect the rights of the complainant, there being no record and no notice to him, either actual or constructive. I further object on the ground that alleged verbal agreements in respect to real property are incompetent to affect the title thereto.

A. No; we had no conversation about it. Mr. Lenman and I had conversations before his death relative to this property; and he said:

"I want you to have the Lenman Building." I said: "I think Isobel had better have it." "No," he says, "I want you to have it." I think he made a memorandum at the time. It was discussed two or three times, and the result was the same each time. Those conversations all occurred in this room.

By Mr. WORTHINGTON:

Q. How long before his death were those conversations?

Mr. DARLINGTON: May it be understood that this line of objection shall apply to each and every question and answer of a similar character?

Mr. WORTHINGTON: Yes; certainly.

A. It was several times before his death.

Q. About how long before his death was the last time? A. About two or three months was the last time. I think in January we had a conversation.

Q. What is your recollection as to whether any other persons were present? A. No other person was present. Just he and I were in this room. He was sitting there at the table drawing.

109 and we discussed the question, and that was the result. I said that I thought Isobel had better have that property, and he said: "No, I want you to have it." There was no more said.

Mr. DARLINGTON: I further object to this testimony on the ground that intended disposition of real estate can not be shown by testimony of verbal conversations with the owner in his lifetime.

Q. After your husband's death, did you have any conversation, arrangement or understanding of any kind with your daughter, with reference to that matter? A. None whatever. He said: "The reason I want you to have it is that I think it will be less care to you and less trouble than it would be to have different property." He said that the 14th Street property would go to Isobel instead of this property.

Q. What is your age? A. I am over 80, sir.

Q. Do I understand that there were no conversations between yourself and your daughter with reference to her having the 14th Street property and you having the Lenman Building? A. No difference—it was simply an understood thing between us. Her father probably told her that he would like her to have that.

Mr. DARLINGTON: I further object to further testimony as to what probably occurred between father and daughter, as incompetent.

110 By Mr. WORTHINGTON:

A. I think you misunderstood my question. I asked you whether, after your husband's death, you and your daughter had any conversations with reference to this matter, as to her having the 14th Street property and you having the Lenman Building? A. No; we did not have any conversation. It seemed to be an understood thing between us.

Mr. DARLINGTON: The objection is renewed.

Q. What do you mean by its being an understood thing? A. I think her father told her.

Mr. DARLINGTON: The objection is renewed.

Q. After this conversation you had with Mr. Peak, when you said you would not take less than $200,000 for the property, will you tell us what conversation you had with anybody else on the subject, after that? A. None whatever.

Q. Do you remember of being called upon or asked if you would sign a deed conveying that property? A. No one asked me that question.

Q. After that, were you notified by Mr. Edmonston, or by anybody else, that they wanted you to make a deed to this property? A. No; Mr. Edmonston sent word to know if we would be ready to sign the deed on a certain day.

Q. What did you do about it? A. I said: "No, I will not be ready."

111 Q. I want to ask you whether at any time you gave any authority to your daughter to sell this property, or do anything about it, except what occurred in the conversation when Mr. Peak was present, about which you have told us? A. No; I think Mr. Peak tried to be pleasant to us, and to help us in that way, and probably he thought he had a good opportunity and would embrace it.

Q. What was your reason for not signing a deed to the property? A. I thought it would be an injustice to the tenants.

Q. Did you have any other reason? A. Yes; I had another reason. There was a good deal of sympathy there, association or sentiment, as some people call it. Mr. Lenman was very fond of that building and had taken great interest in the building of it. He was very fond of going and looking after things. It was a kind of fad with him, as it were; and I thought of all this. I did not think he would like me to sell that property.

Mr. DARLINGTON: The last answer is objected to as hypothetical and incompetent.

Cross-examination.

By Mr. DARLINGTON:

Q. Why did you think this sale would be unjust to the tenants? A. Well, I thought he would not care to have me sell that property.

Q. Why did you think a sale would be unjust to the tenants? A. I thought they had been there a long time.

112 Q. Did you mention to your daughter the fact that you thought it would be unjust to the tenants? A. I did.

Q. How do you fix the second day of May as the day Mr. Peak saw you? A. I don't know of any other day it could be unless it was that time. I was cleaning the house, and was down in the south parlor arranging and dusting some books, preparatory to cleaning up for the spring cleaning. Mr. Peak called that morning. He walked into the north parlor and I think my daughter

sent him in to me. He came in, and there was only he and I in the room.

Q. Your daughter was not in the room? A. She was not. I think she was in the north parlor.

Q. Was she within hearing, or was she too far away to hear what took place? A. I don't know whether she could *near* or not.

JEANNETTE R. LENMAN.
(*By the Examiner, by Consent.*)

ISOBEL H. LENMAN, a witness of lawful age, called by and on behalf of the defendant, having been first duly sworn, is examined.

By Mr. WORTHINGTON:

Q. You are a daughter of John T. Lenman, and of your mother, who has just testified? A. Yes, sir.

113 Q. What, if anything, can you tell us about what your father said with reference to the disposition of this Lenman Building during his lifetime?

Mr. DARLINGTON: I object to any testimony as to verbal statements made by Mr. Lenman in his lifetime in regard to the property, as being incompetent and insufficient for any legal purpose against the complainant.

A. I know that for some five or six months before his death my father was ill at times, and I think he had taken seriously into consideration the making of a will. He had spoken of it, and I had rather urged him to do it. He said: "Why, I do not think it is necessary. There is only you and your mother to be considered, and you will simply divide the property between you as you please." But after his death I found a number of memoranda. I have some of them. Of course none of them were signed; but my mother remembered that I found one which showed distinctly that she was to have the Lenman Building and certain other properties that brought in a revenue, and that I was to have, as I had known from my childhood, the property on 14th Street, which my father told us he held at about the same value as he did the building on New York Avenue. I have made search for that memorandum, but cannot find it. I think it must have been put away with other papers which were put away at that time. As a rule, I destroy everything, because I have so many receipts and things of that kind. I put the current year's receipts in place of them. I think in that way this must have been lost.

114 Mr. DARLINGTON: I object specifically to so much of the answer as states what the witness thinks Mr. Lenman took into consideration with regard to a will, and also to all testimony as to memoranda, either signed or unsigned, made in his lifetime or found among his papers after his death, on the ground that the same are wholly incompetent to affect the interests of the complainant or the title to the real estate in controversy.

I also object specifically to the testimony of the witness as to the

memorandum remembered by her mother, upon the ground that it is incompetent.

By Mr. WORTHINGTON:

Q. Did you see that memorandum which you say your mother remembered? A. Yes, sir; it was I who showed it to her. I found it among the papers.

Q. Is that the memorandum which you say you have searched for and cannot find? A. That is one of them. I am almost sure I destroyed that with other papers.

Q. Have you recently made search for such a memorandum at my request? A. Yes, sir; and even before that.

Q. And you have not been able to find it? A. No, sir. It was just on a little slip of paper.

Q. Where have you made the search? A. Among the papers that I had. Of course I could not open every paper and examine it, because I have a great many papers.

115 Q. Have you searched in all the places where the papers he left should be? A. I went all over those papers after his death.

Q. I wish you would state your recollection as to that memorandum.

Mr. DARLINGTON: It is understood that my objection shall apply to each question and each answer and each part of the answer along this line?

Mr. WORTHINGTON: Certainly; and I will further agree that if the objection is not stated to your satisfaction you may state it at the end of the deposition, with the same effect as if made at the time.

A. My recollection of the memorandum is that the Lenman Building and the two houses adjoining on New York Avenue, and certain other properties, including I think, the property on Seventh Street—at any rate, the property that brought an income was for my mother, while the unimproved property, and some other pieces that were a little doubtful as to income, were assigned to me. My recollection is that Mr. Edmonston saw that memorandum at the time.

Mr. DARLINGTON: I object specifically to what the witness thinks Mr. Edmonston saw.

Q. Is the memorandum which you have just been referring to the only one which your father left, which purports to indicate any division of property between you and your mother? A. They were all just an effort to balance the amount, so that an equal division could be made.

Q. Have you found any of them? A. I think there are some of them in existence.

116 Q. Are they where you could get them now? A. No; they are not. They are in various places. They were just dotted down in a book that he would be writing in at the time. I only surmise that would be what they refer to. There would be "J. H. L." on one side and "J. R. L." on the other. That was all that indicated his object in making the memorandum.

Mr. DARLINGTON: I repeat my objection.

Q. What, if anything, took place between you and your mother, after the death of your father, with reference to that matter?

Mr. DARLINGTON: I object to any testimony as to what took place between the defendants with regard to realty, unless the same is in writing, and either of record or brought to the notice of the complainant or those under whom he claims, prior to this controversy.

A. A short time after my father's death we sent for Mr. Edmonston and talked the matter over with him. He advised us not to divide the real estate, saying that it would be much easier to handle it as it stood. At that time we took all of the personal property, stocks, bonds, and things of that kind and divided them equally between us.

Mr. DARLINGTON: I object to so much of the answer as undertakes to state what Mr. Edmonston advised, as being incompetent and inadmissible against the complainant and those under whom he claims.

The WITNESS: I merely mentioned Mr. Edmonston in the matter because he was present at the conversation.

117 Q. Did anything take place between you and your mother with reference to carrying out what you understood to be the wish of your father. A. It has always been understood between us, from the very beginning, that that property was hers. Of course there has been no division.

Q. Was anything said between you and her in that regard? A. Yes; we talked it over in a general way, that that property was hers and the other property was mine—those two pieces, because they had been specially designated.

Q. How soon was that after your father's death? A. It was not immediately. I suppose it was within a month.

Q. From that time on, what claim of ownership to the Lenman Building did you make? A. I made none.

Q. And from that time on, what claim of ownership, so far as you know, did your mother make to the 14th Street property? A. She never made any.

Q. I wish you would tell us what took place, to your personal knowledge, with reference to offers for the Lenman Building coming from Mr. Peak, who has been a witness in this case. A. I cannot remember the date of Mr. Peak first coming to me, but I think it was probably about the middle of April, 1905. He brought me a little note which was signed by Mr. Lampton, saying—Mr. Edmonston has that note.

Mr. WORTHINGTON: I will produce it.

118 The WITNESS: As well as I can remember, it stated: "Dear Louis: I can get you $100,000 for the Lenman Building." That was the beginning. I simply laughed at Mr. Peak when he brought it. I did not even consult my mother in regard to it. A few days after that he came and raised the amount, and I think he came again; but it did not happen to be convenient for me to have him see my mother. We had spoken of it together and laughed about it, but had not considered it at all. This last morning, when

he came, mother was in the other room, and when he spoke to me about it I said "Mr. Peak, that property is mother's; she claims it. It has always been understood that it was hers, and I would prefer to have you go to her."

Mr. DARLINGTON: I object to any conversation between the witness and Mr. Peak as being incompetent against the party whom we represent.

The WITNESS: Then Mr. Peak went into the room, and I walked in behind him, and after greeting my mother he said: "Mrs. Lenman, I have a proposition of so many thousand dollars for the Lenman Building." Mother smiled and said: "Why, Mr. Peak, I would not sell that building for a cent less than $200,000 net." Mr. Peak smiled and said: "Mrs. Lenman, you are very safe. You will never get it." Then the question of an option came up, and Mr. Peak spoke of an option for sixty days. That was the only time that I spoke during the conversation. I said: "No; not for sixty days." Then he said: "For thirty days; or, as this is the 2d of the month, we will say 28 days." Again mother said: "Mr. Peak, I would not accept a cent less than $200,000 for that building." Mr. Peak said:
"Mrs. Lenman, you are all right; you won't get it." That
119 was his reply. Then he said good-morning and went away.

Q. Can you fix the day of the week when that happened? A. It was on Tuesday morning, the 2d of May.

Q. How do you fix the date? A. Because I remember it. The circumstances are indelibly impressed upon my mind.

Q. Go on and tell us what followed, in regard to that matter. A. About noon, as nearly as I can recollect it, or somewhere between noon and 2 o'clock, I saw Mr. Peak. I am not clear whether Mr. Peak came here or whether he telephoned to me that he had this written option. The conversation was that he did not wish me to act entirely upon his advice in the matter, or rather did not wish us to act entirely upon his advice, and that he would like me to see Mr. Edmonston. I said: "Why, Mr. Peak, I would not have entered into such an arrangement without consulting Mr. Edmonston." After he brought the paper, I think I remember of bringing it up and reading it to mother; but mother says I did not. Mr. Peak also says that he thinks he gave me the paper in his office. At all events, I got the paper.

Q. Just state your own recollection. *Q.* My own recollection is very indefinite in regard to that, but I know I took the paper to Mr. Edmonston's office.

Q. Have you any distinct recollection about it except that you got the paper in some way and took it to Mr. Edmonston?
120 A. I have not. I am sorry to say that is one thing I cannot recall. I was greatly troubled and distressed about it when he told me he had gotten the paper; but I went to the telephone and called up Mr. Edmonston's office. They told me he was there, and I said that I would be down in a few minutes. I went directly to his office, and when I got there they told me Mr. Edmonston was not in. I said: "That is a very strange thing. I telephoned him I would be here." Well, they said that he had gone out and would

probably be in in a few minutes. I think I waited for an hour or an hour and a half before Mr. Edmonston appeared. I was very much annoyed at that, having taken the trouble to ask him to be there. When he came in he came in very pleasantly. I said: "Mr. Edmonston, I do not understand why when I telephoned to you, you could not have sent me word that you would not be in the office." -Why", he replied, "I did not get the message." That, of course, embarrassed me before our conversation began. I at once took the paper out of my pocket and said: "Here is a peper which purports to be an option for the sale of the Lenman Building, and I would like to talk with you about it." Mr. Edmonston sat looking at it, and said: "Why, there is only $100 here as a deposit, and that is a very small amount in proportion to the amount you are going to get for the property." I said: "Yes, sir; I know that; but I feel in honor bound, not having made any objection to such a sale, to stand by my word." "Well," he said, "if that is the case then it is all right." Then he said to me: "Mr. Hoover was in a day or so ago, and asked if you wanted to sell the Lenman Building, and I
121 told him that he had better go to you or Mr. Peak if he wanted any information about it." Then I think he said: "I am on the board of directors of the Savings Company." He mentioned the fact that Mr. Hoover was connected with this Savings Company, and that he (Mr. Edmonston) was on the board of directors. I said: "Mr. Edmonston, the sale, as I understand it, is to be made to Mr. Stilson Hutchins." That about ended the interview. There was nothing more said of any importance that I remember. I was very much disconcerted, and I did not pay very much attention to his mention of Mr. Hoover in that connection, until I thought it over when I went home.

Mr. DARLINGTON: I object to so much of the foregoing answer as refers to statements made by Mr. Edmonston in regard to Mr. Hoover or to the Safe Deposit Company, as being incompetent and inadmissible.

Q. Before you proceed I would like to ask you who Mr. Hoover is, and to whom you were referring in your conversation with Mr. Edmonston? A. I believe that he is the vice-president of the Title Company and trust officer of the Savings Bank.

Q. By "Savings Bank" you mean the National Safe Deposit, Savings and Trust Company? A. Yes, sir.

Q. You say you told Mr. Edmonston you understood Mr. Stilson Hutchins was the purchaser? A. Yes, sir, I did.

Q. What reason did you have for that? A. Mr. Peak had told me that he understood he was the purchaser.

122 Q. When did he tell you that? A. I could not say that positively, but it was before the last interview we had with him in regard to it.

Mr. DARLINGTON: I make the same objection with regard to what Mr. Peak told the witness about Mr. Hutchins.

Q. Do you mean it was in a conversation before the occasion when your mother said she would not take less than $200,000 for the prop-

erty? A. Yes, sir; it was when he brought one of the offers, preceding the last one.

Q. Did he tell you how he knew Mr. Hutchins was to be the purchaser? A. I understood him to say that Mr. Lampton told him so. One of the propositions which was submitted was an offer to take a certain piece of property adjoining Mr. Hutchins' property. I was to take Mr. Hutchins' building and so much in cash in exchange for the Lenman Building.

Q. You say that came from Mr. Lampton? A. That came through Mr. Lampton to Mr. Peak and Mr. Peak brought it to me.

Q. You only know about what Mr. Lampton had to do with it from what Mr. Peak told you? A. That is all. I never saw Mr. Lampton until I signed the paper.

Q. What time in the day did you leave Mr. Edmonston's office? A. I presume that it was 4 or half past 4 o'clock. I stopped on the way at Mr. Peak's office. I was disconcerted, and I wished to recover my equanimity a little bit before I went in. I found
123 Mr. Lampton in Mr. Peak's office, and Mr. Peak told me, after Mr. Lampton went out, that he had been there for a couple of hours. Then I said to Mr. Peak——

Q. You say that when you got there Mr. Lampton went out? A. Mr. Lampton bowed and excused himself and went out. I said to Mr. Peak: "I have been to see Mr. Edmonston, and he has called my attention to the fact that this is a very small deposit in proportion to the amount of the sale." I do not remember what Mr. Peak said in reply to that. We had some further conversation with regard to the matter, but I don't remember what it was. In a few minutes Mr. Lampton returned. I sat at the table about as the stenographer is sitting here, and Mr. Lampton sat at the other side, and Mr. Peak was at the other side. Mr. Lampton began talking about the property. He told me that he knew the whole property. He said: "Miss Lenman, you have very few offices rented there. I know how many are rented and how many are vacant. I have been there with an architect, and I can tell you the thickness of the walls and all about it. Moreover, the property is assessed at very much more than it should be, and you are paying too much in taxes on that property." He said a great many other things which did not pertain to the subject, which I could repeat. Then he said: "Miss Lenman, Mr. Peak has earned his part of the commission. I have had to fight him at every step. His part of the commission will amount to $1500." I did a little sum in my brain, showing that $6000 would be 3 per cent. on $200,000 and I wondered who the other party was. Mr. Lampton, taking the check in his hand, said: "My partner does not
124 even know about this transaction; but if it does not go through he will have to pay his half of it." Later on, when I had finally made up my mind that the only honorable thing I could do was to sign the paper, I signed it and handed it to Mr. Lampton. He folded it up and put it in his pocket. As he did so he said: "Miss Lenman, I suppose you have no objection to accepting all cash?" I answered: "Mr. Lampton, I have very serious objection to accepting all cash." Mr. Peak, who by that time was over at the

safe closing it, said: "Why, Jimmie, you are mistaken. It is $50,000 and the balance at 4½ per cent." "No," he said: "you are wrong. Look at that paper you have over there in typewriting." Mr. Peak looked at it and said: "Yes; this does say that." Therefore, I did not know, until I saw the paper in Mr. Edmonston's hands, whether it was to be all cash or whether it was to be at 4½ per cent. interest.

Mr. DARLINGTON: I object to this testimony of the witness as to the statements of Mr. Lampton about the property, the number of rooms rented, the assessment, and all other statements of that character, for which no foundation was laid upon the examination of Mr. Lampton, as being therefore inadmissible.

By Mr. WORTHINGTON:

Q. I want to ask you whether at this interview, when you signed the paper, anything was said by Mr. Lampton about the purchaser? A. Yes. I want to get just the thread of the matter. I think that was before the paper was signed. He said he did not wish
125 it to get out, and that it was very important to have it settled. He also said that he wished the matter to be kept quiet. It was then I said to him: "Mr. Lampton, you are not to hawk this property about the city. I wish that distinctly understood." In that connection he told a story about "my party."

Q. Do you mean to say he used the words "my party?" A. "My party" were the words. He said: "My party is a very peculiar man. I have had transactions with him before, and in one transaction, which involved a very large amount, the matter got out a little while before, and the whole thing fell through. So it is very important that this should be kept quiet."

I would like to go back for a minute and say that about the time Mr. Peak told me that Mr. Hutchins was the probable purchaser, he told me also that Mr. Lampton did not wish me to say anything about this sale to Mr. Coumbe, who was our agent at the Lenman Building. I looked a little surprised at that, and he said: "You know it will be all right; Mr. Coumbe and I are friends, and if it comes to anything I will turn the matter over directly to Mr. Coumbe." I forgot to mention that at the proper time.

Mr. DARLINGTON: I object to the testimony as to alleged statements by Mr. Peak to the witness, as to what Mr. Lampton said in regard to Mr. Coumbe, as being incompetent and inadmissible for any purpose. I further object on the ground that no foundation was laid for it, even if this were an admissible method of proving any statements made by Mr. Lampton?

126 Q. Have you told all you recollect about what took place at this interview at Mr. Peak's office, where the paper was signed? A. I think that is about all I remember. In speaking of Mr. Peak's portion of the commission, and when Mr. Lampton told me Mr. Peak had earned it, I said: "Mr. Lampton if Mr. Peak associates with you much longer he will be as bad as you are." I have a very distinct recollection of saying that.

Q. Did he explain what he meant when he said that Mr. Peak

had earned his commission? A. He did not, more than that he had fought, step by step, for the price.

Q. Where did you go after you left Mr. Peak's office? A. I came directly home.

Q. Mr. Lampton at that time gave you a check for $100? A. He gave me a check for $100.

Q. Will you look at this paper and tell me if that is the check (exhibiting a paper to the witness)? A. That is the check. I remember that Mr. Lampton said, when he was holding this check in his hand: "Well, this check came from Miss Lenman and it is going back to Miss Lenman." We had made a loan to Mrs. Lampton on some property. I think he had gotten the money for it a day or two before.

127 Q. I want to know whether this check has been retained in your possession. A. No; I turned it over to Mr. Edmonston at once.

Q. It has never been presented for payment? A. No.

Q. I see written across it, in blue pencil: "Cancelled by direction of Miss Lenman. W. E. E." A. Yes, sir.

Q. Do you know in whose handwriting that is; is that Mr. Edmonston's handwriting? A. Yes, sir.

Mr. WORTHINGTON: I ask that this check be marked for identification.

(The above mentioned check was marked for identification "W. H. S. No. 1.")

Q. Do you remember where you went after you left Mr. Peak's office on this occasion when you received the check and signed the paper? A. I came home. Mr. Peak walked up to the corner of 11th and L streets with me.

Q. I want to ask now what conversation, if any, you had with your mother on the subject after you signed the paper. A. When I came into the house I found her sitting at the table, and I said, rather abruptly: "Well, I suppose our property is going to be sold." She looked horrified, and nearly fell from her seat, she was so astonished. I think she did not sleep that night. She was very much distressed, and naturally I was very much distressed.

128 Q. I want to ask you to tell us whether anything took place between you, aside from what you have already told us, with reference to the question as to whether you should sell the property or not sell it? A. My mother said to me repeatedly: "What shall I do; what shall I do?" I said: "I can do nothing. You will have to decide for yourself."

Q. Let me ask you whether she, at any time, authorized you to sell the property for $200,000, or any other sum? A. No, sir.

Q. Or whether, after you had signed the paper, and told her of it, she agreed to it, and said it might stand, or anything of that kind? A. No, sir; she never agreed to it.

Q. I want to bring you now to a conversation which I understand you to say you had with Mr. Jones, the complainant in this case. Tell us, in the first place, how it came that you went to Mr. Jones.

A. That was the first suggestion I had as to the possibility of their being the purchasers. Mr. Hutchins was first, and then, as a possibility, came the Savings Bank. On Wednesday morning I was engaged all the morning. A number of telephone messages came for me, which could not be answered. I was told of them when I came home Wednesday afternoon. Mr. Edmonston telephoned to know whether we would be ready to sign the deeds on Thursday morning. I asked my mother if she would be ready, and she said:

"No, I will not." On Thursday morning I had an engage-
129 ment with the dentist. On Thursday afternoon I had a telephone message from Mr. Coumbe, I think. First I had a telephone message from Mr. Lampton, asking whether we were going to sign the deed. I said to Mr. Lampton: "You have 28 days, and you will allow us a like courtesy." That was my reply over the phone. I think Mr. Coumbe telephoned me that same day, or that he came here, I cannot remember now whether he came to the house or telephoned me, to know whether Mr. Lampton was entitled to see the leases and papers pertaining to the property. I replied that he was not. On Friday morning Mr. Peak came in, and in a few minutes Mr. Coumbe came in. A few minutes after that Mr. Edmonston came in. I had written a little note to Mr. Edmonston asking him to come, because I wanted to know a little bit more about this deed which he had asked us if we were ready to sign. So the three gentlemen met in the north parlor downstairs.

Q. That was on Thursday? A. That was on Friday morning. As Mr. Edmonston came in I turned to the other two gentlemen and said: "Gentlemen, this is the gentleman you go to for advice and get none." Mr. Edmonston said, in rather a hesitating way: "I didn't want to butt in." Then we conversed about the subject, and still Mr. Edmonston did not commit himself in regard to this Savings Bank Company at all; so that I was still in doubt as to who was the real purchaser.

Mr. DARLINGTON: Can we agree once for all that my objection shall apply to the witness repeating what different people said when Mr. Jones was not present?

130 Mr. WORTHINGTON: Yes.

It is agreed by and between counsel that objections shall be understood as being taken to each and every statement by the witness of statements made by other persons to her in the absence of the complainant.

By Mr. WORTHINGTON:

Q. I wish you to tell everything that influenced you, up to the time you went to see Mr. Jones, after you signed this paper. A. My mother's distress of mind influenced me a great deal, because she was very much distressed on her own account and very much distressed on Mr. Coumbe's account. Mr. Coumbe had been there for some years previous to my father's death. The engineer had been there for some years previous to my father's death, and all our tenants were people who had been there for many years. I felt entirely helpless, and I could not advise my mother at all. I felt that was a

matter which rested with her, and I could not advise her in any way, and I did not.

After the gentlemen left on Friday morning, I thought the matter over for a few minutes, and I decided that I would find out who was the purchaser. I went directly to Mr. Coumbe's office and had a few words with him. I did not know Mr. Jones was president of the bank. I said to Mr. Coumbe: "Will I find the president of the bank in the building?" He said: "Yes; you will find Mr. Jones there. He is a very nice gentleman. I will go in with you if you would like me to go." I said: "No; I prefer to go by myself." I
131 went into the bank and was directed to Mr. Jones's office. I introduced myself to Mr. Jones, and I said: "Mr. Jones, have you such a person as Miss Wilhoite in your employ?" He replied: "No such person." I asked: "Do you know any such person?" He replied: "I believe there is such a person employed by Messrs. Lampton & Early in their office." Then I said: "Are you the ultimate purchaser of the Lenman Building?" "Yes", he replied, "I am the purchaser of the Lenman Building. You know the company could not hold it unless we use it; so I am buying it for the company." I said: "Have you any objection to telling me what you expect to pay for it?" He replied: $210,000; have you any objection to saying what you expect to get for it?" I answered: "$200,000."

Q. He said $210,000, and you said $200,000? A. Yes, sir; I am trying to put it as briefly as possible. Then I said: "This is a great surprise to my mother and me, and we are very much distressed about it." I mentioned the fact that these employees had been there for a great many years, and the tenants had been there for many years. Then he said: "Well, we don't expect to make any changes. Mr. Coumbe will go on and the engineer will go on. We are just going to put in a new entrance and a new elevator. I have my plans all drawn and ready as to what I expect to do." He said: "You just take your papers down to Mr. Edmonston; we don't trust Lampton. We want to get this matter out of his hands just as soon as we can." I asked Mr. Jones if he had an option on the property, and he said "Yes." I asked him for how long, and he said for five days. I asked him when it expired, and he said "On Saturday"—after hesitating a
132 moment. Then he said: "Now, Miss Lenman, you take the papers and go right down to Mr. Edmonston. You will find that he is all right and you can trust him." I said: "There must be something a little bit crooked about this transaction. I understood the payment was to be $50,000 in cash and the balance at 4½ per cent. for three years." He replied: "No; we might pay you 4 per cent., but we won't pay you 4½ per cent."

Q. Is that what he said? A. That is what he said. I think that was about the substance of the conversation between Mr. Jones and myself. I think finally he said: "Well, we may possibly pay you 4½ per cent." He said that Lampton had an option for $180,000 before this, and I said: "No, sir; this is the first option Mr. Lampton ever had, and the only one." I can fix the date absolutely, because I do not make deposits at the Metropolitan Bank very frequently, and I went directly from Mr. Jones's office to the Metropolitan Bank and

made my deposit. I have been looking the matter over since, and I went back to my bank book.

Q. Do you fix the date of this conversation by the date of that deposit? A. Yes, sir.

Q. You have said this was on Friday? A. On Friday, the 5th.

Q. It was the Friday following the Tuesday when you signed the paper. A. Yes, sir. After making my deposit I went back to Mr. Coumbe's office, and I began to think that perhaps Mr. Coumbe was in the matter too, if he was going to act as agent for Mr. Jones.

133 Q. I would like to ask you a little more about what Mr. Jones said with reference to plans. A. He said nothing more than that. He had this roll of papers there, and he said: "We have our plans."

Q. The first time you say he said: "I have my plans." Now you say "We have our plans all made." A. I think he said "I," but I would not be positive about that.

Q. Do you say he waved the papers A. He waved to a bundle of papers on his desk.

Q. Can you give us any idea as to the size of the bundle? A. It was a roll of papers, and it looked like a bundle of architect's papers, I should say. I was not very near to them.

Q. He said that they had the plans already made? A. That they had plans already made. I had signed the paper Tuesday evening about 5 o'clock, and this was Friday morning about 10 or 11.

Q. You say you signed the paper at what time on Tuesday? A. About 5 o'clock on Tuesday evening, and about half past 4 o'clock on Wednesday Mr. Edmonston telephoned to know if we were ready to sign the deeds.

Q. Where was the bank where you made a deposit on that day? A. The Metropolitan Bank.

Q. Was the deposit to your credit? A. To the credit of the estate.

Q. In what name is the account there kept? A. In the

134 name of J. R. and J. H. Lenman, Administrators.

Q. Where was the office of Mr. Jones, with whom you had the conversation? You have not identified the gentleman. A. It was in a little compartment in the bank.

Q. You mean in the bank at what place? A. At the corner of New York Avenue and 15th Street.

Q. Mr. Jones was the president of the company there? A. The name "President" was over the office, and I presumed he was the president, as he acknowledged his name.

Q. You were present at Mr. Edmonston's office some time after that, when a formal tender was made? A. Yes, sir.

Q. Tell me who were the persons present on that occasion. A. Mr. Edmonston telephoned me to know if I had any objection to meeting——

Q. I simply want to know the persons who were present? A. He named an hour, and I was there a little ahead of time. I saw sidewise and I saw an assemblage of gentlemen in the passage. They filed in. I think Mr. Darlington was the first person to enter the room.

I don't remember whether this gentleman (indicating Mr. Douglas) was the second or third. I think Mr. Jones came in next to Mr. Darlington, and then Mr. Hoover, and then Mr. Douglas.

135 Q. What Mr. Hoover was that? A. That was the Mr. Hoover who had been talking to Mr. Edmonston. He is a gentleman with red hair, rather a slight gentleman.

Q. Rather a slight gentleman? A. Well, he is tall, I would say, but not very stout. He has red hair. That will identify him. Then came Mr. Early, whom I had never seen before; then Mrs. or Miss Wilhoite, and Mr. Lampton.

Q. How clear are you about Mr. Lampton having said that his partner did not know anything about this transaction, but would have to stand half the loss if the sale did not go through? A. I am absolutely sure of it.

Cross-examination.

By Mr. DARLINGTON:

Q. Have you any knowledge as to the date or dates at which these several memoranda, made by Mr. Lenman, were made? A. They were made, I should say, in December, January and February—in January of 1892.

Q. How do you fix the time? A. Because at that time my father was confined to the house, and he was drawing and working over his books.

Q. When did you first see these memoranda, or any of them? A. After his death, when I went over his papers.

136 Q. How do you know they were not made earlier? A. Because I did all the business for him while he was ill, and I would have seen them. I had knowledge of my father's business always. He kept his accounts in certain books, which I had at my command all the time.

Q. And yet you did not see them until after his death? A. I was not looking for anything except what was directly my business.

Q. Might they not have been there for a year before his death, and you not see them, since you were not paying any particular attention to them? A. For a year? Probably.

Q. Can you give us anything that will enable us to form an opinion as to whether that might not have happened? A. My father had always said that he would not make a will. He had said all his life that he would not make a will; that there was no one but my mother and myself, and that we would share equally in all that he had. That had always been discussed between us, and I had said to him, after his illness, when we felt that there was a possibility always of his death, that I would prefer him to make a will.

Q. I believe you say he was considering that for a time? A. I think he must have been.

Q. So far as you know, these memoranda may have been with a view to a possible will? A. Yes; that was my impression when I saw them.

Q. Is it your present impression that you may be able to find some of these memoranda? A. I possibly may.

137 Q. If you can do so, you will produce them before your testimony is closed? A. Certainly.

Q. Did I understand you to say that you could not recall specifically just what property you were to get, and what property your mother was to get, under these memoranda? A. No, with the exception of these two pieces of property which were my father's specials. He had been specially attached to the place out in the country, and he was always very much interested in this New York Avenue property. Of course he had a great deal of property that was not particularly interesting to him.

Q. So that Mrs. Lenman and yourself have never yet been able to ascertain or describe specifically just what it was your father wished you to have and what he wished his wife to have? A. What he wished us to have was to have as nearly as possible a division of the property, making the values to correspond.

Q. What particular pieces you were to get and what particular pieces your mother was to get, you have never been able to fully and completely fix? A. My father purchased the property on 14th Street in 1858, with the idea of going there to live, and all my life it has been understood that that property was to be mine. I suppose his idea of this other property for mother was to balance that.

138 Q. Without being inquisitive, could you tell us, in a general way, what proportion of your father's estate the Lenman Building and the 14th Street property constituted? I refer only to his real estate. A. I should say that I suppose my father had about $600,000 worth of real estate, and perhaps more than that.

Q. All his real estate, I suppose, is shown by the tax bills? A. Yes, of course. I have never made an estimate of that. It is merely a rough guess. All of his real estate is still assessed in his name. We have sold only one piece of property since his death.

By Mr. WORTHINGTON:

Q. For what amount? A. For $32,000.

By Mr. DARLINGTON:

Q. How long ago? A. In 1893 or 1894.

Q. Who has collected the rents of the real estate since your father's death? A. Mr. Coumbe has collected some; Fisher & Company have collected some; Mr. Peak has collected some, and I collected a good portion of it.

Q. Those agents have made periodic statements of rents received, have they not? A. Yes; every month.

Q. To whom have they made those statements? A. They usually make them to me, and they are deposited to the credit of the administrators of the estate.

139 Q. To the joint credit of both? A. Yes, sir. I keep a set of books for myself personally and a set for the estate. All payments are credited to the estate book, and all deposit- are

made to the credit of the administrators, in the Traders and in the Metropolitan Bank.

Q. If I understand you, the rents of the real estate have been credited to your mother and yourself as administrators? A. Yes, sir.

Q. And the accounts have been kept jointly? A. Yes, sir.

Q. Have there been any leases made upon the Lenman property? A. Yes, sir; I think a number of the tenants are lessees.

Q. Who has made those leases? A. Mr. Coumbe usually.

Q. When he did not, who made them? A. I think there was only one, Mr. Darlington, and that was for the Maryland Bond Company. They would not take Mr. Coumbe's signature on the lease, and so, to save any trouble, I signed the lease. They would not take the signature of the agent.

Q. Did they assign any reason for not taking it. A. They said it was against their rules.

Q. Have you that lease? A. No, sir; I have not. Mr. Coumbe keeps the leases of all the property.

140 Mr. DARLINGTON: We call for the production of that lease.

Q. Has that lease been made more than once? A. It has just been renewed.

Q. Mr. Coumbe would have them both? A. I presume so. I think he spoke to me some time ago about renewing the leases. I am not positive whether he renewed it or not.

Mr. DARLINGTON: We call for whatever leases he has.

Mr. WORTHINGTON: I presume he would have a duplicate of it. The lease proper would be in the hands of the tenant.

The WITNESS: I think the tenants were all approached by some one who represented your side of the case. I was told by the tenants indirectly that they had been approached.

By Mr. DARLINGTON:

Q. You had no objection to that, had you? A. No, of course not. It would not have been worth while to object.

Q. Do I understand that this is the only lease you remember, signed by your mother or yourself, for any part of the Lenman building? A. So far as I know, it is the only one. I think the others all make their leases direct with Mr. Coumbe. I think it is customary to make leases in that way. We have some other property leased by agents, and the agents make the lease.

141 Q. What, if anything, did your mother ever do in respect to the Lenman Building as owner? A. She was always consulted as to everything that was done there.

Q. I mean since your father's death? A. Yes, sir.

Q. Can you mention any act of ownership she ever exercised over the property? A. I think that would be rather difficult. There has been nothing to call for it. Mr. Coumbe would come to me and say: "Miss Lenman, such-and-such a thing has come up." I would

reply: "Mr. Coumbe, I will go to mother and see what she says about it, before I can give you an answer."

Q. You and your mother were both administrators of your father's estate? A. Yes, sir; jointly.

Q. You kept the real estate rents in your administrator's account? A. The real estate accounts were kept jointly.

Q. Do I understand that the real estate agents in charge of the property made their statements to you and your mother jointly or to you alone? A. Fisher and Company have always made their reports to mother. The others always make their reports to me. There were no instructions given in regard to it, but they simply transact the business with me because it is not always convenient for them to see my mother.

Q. Have you any of the rent statements for the Lenman
142 Building prior to May, 1905? A. Yes, sir.

Q. Will you kindly produce some of them, so as to show what they are like, before your testimony closes? A. I can produce them back for a space of ten years I suppose. I usually keep them for about ten years and then destroy them, because they accumulate so.

Q. I understand you to say that all the rents of the property, including the Lenman building and the 14th Street building, went into your joint account as administrators? A. There is no rent from the property on 14th Street. There is a sinking fund into which money goes, and out of which it does not come.

Q. The property that does pay rent, including the Lenman Building was accounted for to you and your mother, and went into your joint account? A. Yes, sir. I have real estate in my own name which absolutely belongs to me, but only real estate that has been acquired since my father's death. By the advice of our attorney, that property has been deeded to me, but the revenues go right into the estate account.

Q. What are some of the other pieces of real estate belonging to the estate, leaving out the Lenman Building and the 14th Street property? A. Am I obliged to answer such a question as that?

Mr. WORTHINGTON: I do not see any reason why you should not.

A. Well, we have two properties adjoining the Lenman Building, No. 1415 and 1417 New York Avenue. Then we have
143 920 Pennsylvania Avenue.

Q. Do they yield rent? A. Yes, sir.

Q. What have you ever done in the way of making a claim to an interest in these properties? A. I have never made any claim. My claim is understood without my making a claim.

Q. What, if anything, did Mrs. Lenman ever do in the way of making a claim to these properties? A. I don't think she has ever made any claim. We conduct our business in a very quiet, peaceable way.

Q. How did 28 days come to be fixed as the time limit in this contract with Mr. Lampton? A. I think I stated that Mr. Peak first said 30 days, and then said: "This is the 2d, and we will say 28 days."

Q. When and where was that. A. Downstairs in the parlor below, on Tuesday, the 2d day of May.

Q. In whose presence? A. In my presence and in my mother's presence.

Q. That was the same occasion when your mother mentioned $200,000 net as the lowest price she would take for the property? A. Yes sir.

Q. At that time the option time limit was fixed, so far as it was fixed? A. So far as it was fixed, yes.

Q. Did your mother make any objection to that. A. She
144 made no objection. I don't think she paid the slightest attention to it. Neither one of us took it seriously at the time.

Q. And yet you did discuss the length of the option, and agreed on 28 days? A. It was discussed between my mother and Mr. Peak. I came into the conversation by saying: "No, not sixty days." That was the only remark I made.

Q. Then it was fixed at 28 days? A. Then Mr. Peak made that remark, and I don't think mother made any response to it.

Q. What is your best recollection as to the place at which you received this option, or this contract, from Mr. Peak? A. Up to yesterday I would have said that Mr. Peak brought the option here; but a little remark that Mr. Worthington made to me called my attention to the matter, and upon turning it over in my mind since then I have been rather uncertain. He did not ask me any question, but something he said suggested the subject to me. I could not say whether I stopped at Mr. Peak's office as I went down to Mr. Edmonston's and got the paper, or whether he brought it to me.

Q. Up to yesterday your best recollection was that you received it here at the house? A. Yes, sir.

Q. You say Mr. Peak told you, at the time he delivered it to you, that he would prefer you to see Mr. Edmonston before
145 making your final decision? A. Yes, sir.

Q. And you told him you would not have closed without seeing Mr. Edmonston? A. No.

Q. What was there to greatly distress you when Mr. Peak told you that he had this offer? A. To distress me when he told me that he had the proposition?

Q. Yes. A. I don't think I said I was distressed at the time. It was after it was accepted, and when I came to sign the paper.

Q. I have it in my notes that you were greatly distressed when Mr. Peak told you that he had gotten this paper from Mr. Lampton. Am I mistaken? A. I think you are mistaken. I was disturbed, but I could not say that I was distressed?

Q. Why were you disturbed? A. I was disturbed because I had hoped the thing would not amount to anything. I had no desire to sell the property.

Q. You had not signed any paper then? A. I had not signed any paper.

Q. You said your mother had not authorized you to sign any? A. She had not.

Q. And yet you were greatly disturbed, and you did sign it?

A. I was greatly disturbed, because I felt I was in honor
146 bound, knowing that I had given my assent. I think Mr. Edmonston would verify that, for I think I made that remark to him. My father had taught me always that my word should be as good as my bond.

Q. Was it at that interview with Mr. Edmondston on May 2d, before you signed the paper, that he said something to you about the National Safe Deposit Savings and Trust Company? A. He did not speak of them as purchasers. He spoke of Mr. Hoover having come to him. As nearly as I can remember, he said that Mr. Hoover came in to see him and said that I wanted to sell the Lenman Building.

Q. That was your first information that they were interested in this matter? A. My first information that they had any idea of it. Of course they had made propositions before, through Mr. Coumbe, at various times; but in this connection that was the first.

Q. This was the first thing that conveyed to your mind the idea that they were or might be interested in this transaction? A. Yes; that they were at all considering it.

Q. Was it not after the 2d of May that Mr. Edmonston first spoke to you about the Safe Deposit Company? A. No, sir; it was May 2d.

Q. You are quite sure it was before you signed the paper? A. Yes, sir; I am positive.

Q. I think you say that you told Mr. Edmonston, on that
147 occasion, that the only honorable think you felt you could do was to sign the contract? A. I felt so at that time, yes sir. I have had reason to change my mind since.

Q. What has occurred since to change your mind? A. I think the whole circumstances have changed my mind.

Q. What circumstances have changed your mind? A. A great many things.

Q. Would you mind telling us some of them? A. I think, for instance, that I was not correctly informed as to the purchaser. That is one thing that has changed my mind.

Q. Is there anything else? A. Yes; my mother's distress about the matter, and my own feeling that it was a foolish thing to do.

Q. You knew, when you signed this paper, that Miss Wilhoite was the purchaser? A. I saw Miss Wilhoite's name on the paper.

Q. Were you told, at the time you signed this paper, that anybody was the purchaser? A. It would be difficult to tell. I had to take the gentleman's word for that.

Q. I ask you that because you say you asked Mr. Lampton not to hawk the property about. A. I did, because I supposed Mr. Lampton's object was to sell it if he could, but that he did not know positively he could sell it.

Q. You did not know that he had any purchaser at that
148 time? A. Only that it had been intimated to me that Mr. Hutchins was the probable purchaser.

Q. When did you first meet Mr. Lampton? A. Some years before that I went with Mr. Peak to look at a piece of property on

Bancroft Place on which he wanted me to make a loan. I usually look at the properties when we make loans, unless I am thoroughly satisfied about them. Mr. Lampton, I think, owned the property, or had built the house; and I was introduced to him then.

Q. Had you met him at intervals from that time on? A. I had seen him in Mr. Peak's office just to bow to him, but I had no conversation with him from that time until I met him in regard to this business.

Q. I do not want to ask you anything about what took place between yourself and Mr. Edmonston unless you are entirely willing to state it. I ask this question, so that you can answer it or not, as you please. Was or was not the amount of revenue derived from the Lenman Building discussed between you and him in this interview of May 2d? A. It had been discussed many time- before. I do not remember that it was discussed then.

Mr. WORTHINGTON: I will say that since Miss Lenman has gone into that conversation, it is perfectly proper for you to ask her anything about it you see fit.

The WITNESS: I should be perfectly willing to answer it if I could remember it.

By Mr. DARLINGTON:

149 Q. What, up to that time, had been approximately the net revenue from the Lenman Building? A. I have never figured it out, Mr. Darlington.

Mr. WORTHINGTON: I object to this as not proper cross-examination. I have not gone into the question of the value of the property or the rental value.

By Mr. DARLINGTON:

Q. At this interview with Mr. Edmonston on May 2d, was not the net revenue stated and discussed as compared with what would be yielded by $200,000? A. No, sir; I think not. I may have said to Mr. Edmonston: "Mr. Peak has recommended this, because he feels that the per cent. on $200,000, taking out the care, would be better than the net revenue from the property." I may have said that, because that was Mr. Peak's argument.

Q. Do you not remember stating to Mr. Edmonston what the revenue was, approximately, from the Lenman Building? A. No, sir; because I have never approximated it. I could very quickly approximate the amount of the stores, but I could not the amount of rent for the rooms. I think it is possible I may have stated to Mr. Edmonston the argument that Mr. Peak used in regard to the sale, in discussing it.

Q. Coming down to your interview with Mr. Jones. Do you remember how you introduced yourself to him? A. I simply said: "Is this Mr. Jones?" and he answered "Yes." I said: "I am Miss Lenman."

Q. Did you not say to him: "I am Miss Lenman, your
150 next door neighbor and the owner of the adjoining property?" A. No, sir; I don't think I did.

Q. Is your recollection positive that you did not use that language? A. It is not positive one way or the other; I could not say. It was rather an embarrassing thing to do.

Q. Do I understand you to say that you told him you were greatly surprised? A. Yes, sir; I did.

Q. What was it that surprised you? A. Because I had not expected such a snap judgment. As I said a little while ago, we had not taken the matter seriously at all.

Q. What was it that surprised you? A. The suddenness of it.

Q. Of what? A. At 8 o'clock in the morning the proposition was made, and at 1 o'clock the option was presented for signature, and at 5 o'clock a check binding it was signed, and it was consummated; and on Wednesday afternoon, the following day, we were asked if we were ready to sign the deeds.

Q. All this had taken place on Tuesday, and this talk with him was on Friday? A. Yes, sir; On Tuesday or Wednesday.

Q. You do not mean to say that you were surprised at anything Mr. Jones was responsible for, or that he had done? A. No; not at all.

151 Q. You were not surprised to find that he was interested in this transaction? A. I believe women are credited with putting 2 and 2 together and making 5. Taking the circumstances and the remark which Mr. Edmonston had made, I had some reason to suppose that Mr. Jones might be the purchaser.

Q. And you had that reason before you signed the paper? A. No, sir; I did not pay the slightest attention when Mr. Edmonston said that. I was so fully convinced that Mr. Hutchins was the purchaser that it did not make any impression on me when he spoke about Mr. Hoover. It was only when I turned the matter over after I came home.

Q. And yet no one had told you that Mr. Hutchins was the purchaser? —. Mr. Peak had told me he was the probable purchaser.

Q. You were so far from knowing who the actual purchaser was, or whether there was any, that you requested Mr. Lampton not to hawk the property about? A. I did. I will say that there was one circumstance which also helped me to conclude that it might be Mr. Hutchins. I think perhaps a day or two before that I had had a notice that two houses adjoining Mr. Hutchins' property were to be vacant. They had been rented as a school. I knew that I would have to expend a great deal to put them in proper repair. I had called up Messrs. Birge & Gasch and had stated to them: "If you can sell this property to Mr. Hutchins you can do it."—naming a certain figure.

152 Q. What property was that? A. 1212 and 1214 Fourteenth Street. The adjoining property at the corner of Fourteenth Street was the property of Mr. Hutchins. As nearly as I remember it, they were to pay so much cash and take the Lenman Building, and I was to accept Mr. Hutchins' building at such a figure. My property was to be sold to Mr. Hutchins for $100,000.

Q. This Hutchins property is at the corner of 14th and Massachusetts Avenue? A. Yes, sir.

Q. And you had the two adjoining properties? A. Yes, sir.

Q. 1212 and 1214? A. Yes, sir. That was pending during this time. Mr. Hutchins had a verbal option for a day or two; and when I telephoned to him about it, this day, he had accepted the option verbally, but had not come to the mark; so I supposed then he had taken into consideration the probability of purchasing the two properties.

Q. Did those two properties appear in any way on this memorandum of Mr. Lenman's? A. Yes; all the property was on the memoranda.

Q. Do you remember to whom they were assigned? A. I think they were assigned to me. As I remember it, father did not consider them as so very desirable as rental property?

Q. Is your recollection very clear about that? A. Not very clear, but I am almost sure they were assigned to me.

153 Q. Were you acquainted with Mr. Hutchins personally? A. Not at all.

Q. Had you any reason for being desirous that he should be the purchaser of the Lenman Building? A. I think I would have prefered that he should not be.

Q. As a matter of fact, you would have preferred some other person as the purchaser? A. If I had had my choice; yes.

Redirect examination.

By Mr. WORTHINGTON:

Q. You have stated that something I remarked to you shook your recollection about where you received that paper. Do you remember what my remark was? A. I think your remark was this: You were speaking to mother about whether she was sure she had not had the option read to her, or what purported to be an option. I wish to say very distinctly that when I signed that paper I supposed it was an option and not a sale, and that the matter would be referred to my mother eventually, before there would be anything done about it.

Q. Do you remember what I said your mother had said on the subject?

Mr. DARLINGTON: I object to this question as an incompetent method of proving an incompetent fact.

A. What you said was that my mother stated positively that the paper had not been read to her, and that she had not signed
154 it and had not read it herself—nor had it been read to her.

The further taking of these depositions was thereupon adjourned until Friday, February 15, 1907, at — o'clock p. m.

WASHINGTON, D. C., *March* 2, 1907—2:30 o'clock p. m.

Met pursuant to agreement at the office of Mr. A. S. Worthington, Columbian Building, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Douglas.

Present on behalf of the defendants, Mr. Worthington.

Present also, the defendant, Isobel H. Lenman and James Lampton, Esq.

Whereupon ISOBEL H. LENMAN is recalled for further direct examination.

By Mr. WORTHINGTON:

Q. Will you look at this note and envelope, and tell me whether they form the communication from Mr. Lampton, which you testified the other day you received through Mr. Peake and turned over to Mr. Edmonston? A. Yes, sir; I think that is the same.

155 Mr. WORTHINGTON: I offer these papers in evidence.

The above mentioned papers were filed herewith, marked Ex. I. H. L. Nos. 1 and 2, and are in the words and figures following to wit:

"Ex. I. H. L. No. 1.

Early & Lampton, Real Estate Brokers, Loans and Insurance,
Nos. 615 and 617 14th St. N. W.

WASHINGTON, D. C., *April 13th*, 1905.

DEAR LOUIS: I can get you $100000 for the Lemmond Bldg., 75,000 3 years a 4% $25000 cash. Please be kind enough to let me know & greatly oblige

Yours,

LAMPTON."

"Ex. I. H. L. No. 2.

If not delivered in 3 days return to
Early & Lampton, Real Estate Brokers,
Loans and Insurance, 615 and 617 14th
St. N. W. Washington, D. C.

Mr. LOUIS R. PEAKE,

#604 11*th* N. W.

City."

156 By Mr. WORTHINGTON:

Q. At the last session Mr. Darlington requested you to search for some of the memoranda which you said your father had made in his lifetime, relating to the division of his real estate. Have you made any further search? A. No; I have not had time to look for them.

Q. What has been the trouble? A. We have had sickness, and I have had to be the cook and do various other things, which have kept me very much occupied.

Q. Have you produced, as requested, some statements with reference to the rents of the Lenman Building? A. Yes, sir; I turned over to you some of them.

Q. Are these the ones you delivered to me (exhibiting papers to the witness)? A. Yes, sir.

The witness produces two papers, one purporting to be a statement made by Thomas J. Fisher & Co., dated May 1892, and the other one to be dated February 20th, 1893, A. T. Coumbe, which statements counsel for the defendant turns over to Mr. Darlington.

The WITNESS: I merely took these out of a number that I had. I did not know that I had any as far back as that.

Cross-examination.

By Mr. DARLINGTON:

Q. Have you not some more recent statements than these?
157 A. Yes, sir; I have some more recent ones, but I thought you particularly requested me to get those that were dated back.

Q. No, I did not. A. That is what I understood you to ask for, and it took me some trouble to find these.

Q. You have told us that when you arrived at Mr. Peak's office, on the day the contract was signed, you found Mr. Lampton there, and that he retired for a little while. A. Yes, sir.

Q. When he re-entered the room, do you remember the first thing that took place? A. No, I do not.

Q. Do you remember saying to him: "I suppose you want this contract?" A. No; I cannot say that I remember that.

Q. Do you not remember that you handed him the contract as soon as he entered the room, with the remark that it was already signed by you? A. No, sir.

Q. Do you mean that you do not remember? A. I remember perfectly that it was not signed when he entered the room.

Q. How long after he returned to the room was it, before it was signed? A. Some time.

Q. Do you recall now anything that was said by Mr. Lampton on that occasion, other than you have told us in your former testimony? A. No, I think not.

158 Mr. WORTHINGTON: Have you noted the presence of Mr. Lampton at this session?

The EXAMINER: Yes, sir.

Mr. DARLINGTON: Mr. Lampton is present here at the request of counsel for the complainant, because he understood Mr. Coumbe would be here to testify to certain alleged statements made by Mr. Lampton to him. If his presence is objected to we will have him retire until Mr. Coumbe is sworn.

Mr. WORTHINGTON: I do not care to make any objection. I simply wanted the fact noted.

By Mr. DARLINGTON:

Q. You will still endeavor to furnish us with these memoranda made by your father? A. I will do so if I can; yes, sir.

Q. At page 19 of your deposition, referring to this interview at Mr. Peak's office at which the contract was signed, you say: "Later on, when I had finally made up my mind that the only honorable thing I could do was to sign the paper, I signed it and handed it to Mr. Lampton." At page 41 you testified that you were greatly disturbed when Mr. Peak told you he had gotten this paper from Mr. Lampton "because I felt I was in honor bound, knowing that I had given my assent." Can you explain that any more fully than you have done? A. "By my silence," should have been there, because I did not give my assent verbally.

Q. By your silence on what occasion? A. At the interview between Mr. Peak and my mother.

Q. You have heard your mother's statement in regard to $200,000 being the lowest price, and you had discussed with Mr. Peak the length of the option? A. No; I had not discussed it.

Q. Did you not tell us that you objected to an option for 60 days? A. I objected to 60 days; but that was the only thing that I said. My mother did not consent to sell. What she said was that she would not accept one cent less than $200,000.

Q. It was by reason of what occurred at that interview that you felt in honor bound, and felt that you had given your assent? A. Yes, sir.

Q. At page 20 of your testimony, I find this statement: "I did not know until I saw the paper in Mr. Edmonston's hand whether it was to be all cash, or whether it was to be at 4½ per cent. interest." To what paper do you refer as being in Mr. Edmonston's hand? A. That was afterwards, I think. It was some time afterwards in Mr. Edmonston's office.

Q. Some time after the day when the contract was signed? A. Yes, sir.

Q. What paper was that you saw in Mr. Edmonston's hand? A. I do not remember.

160 Q. Mr. Edmonston has never had this contract in his hand, since the day that you interviewed him before you signed it, has he? A. Not to my knowledge? Of course it was given to Mr. Lampton at the time.

Q. What paper was it that you saw in Mr. Edmonston's hand, to which you refer on page 20, when you say that you did not know until then whether it was to be all cash or to be at 4½ per cent. interest? A. I cannot imagine.

Q. Was it the day when the tender was made, and you and Mr. Edmonston were examining the deed and other papers? A. I presume it must have been. I have no recollection of any other time.

Q. I believe you say you had some discussion with Mr. Jones as to whether he was to pay 4 per cent. or 4½ per cent. interest, or all cash? A. Yes.

Q. Is your recollection clear that Mr. Jones said to you, at the interview you have mentioned, that he had his plans drawn up and ready for the changes in the building? A. Perfectly clear.

Q. And that he had them on his table? A. Presumably; he waived his hand to a bundle of papers and said: "We have our plans all ready."

Q. I believe you stated, on your former examination, that your best recollection was that he said: "I have my plans all
161 ready"? A. Yes; and I thought that over after I had made that statement. I remembered then that you had made a point as to whether it was "I" or "We." I carefully went over the matter in my mind and I am quite sure that it was "We."

Q. Do you think it was Mr. Worthington or me who *me who* made the point as to whether it was "I" or "We"? A. Somebody made a point about it but I could not say which one of you it was.

Q. What has helped you since to determine whether it was "I" or "We"? A. Simply thinking it over very carefully.

Q. What did you think about to enable you to conclude that you had been mistaken? A. I went all over the interview very carefully, in my own mind.

Q. You cannot recall any fact or circumstance which enables you now to change your recollection? A. No, sir; when you were examining me I had not, for six or eight weeks, even read over the paper I had given as my statement.

Q. What paper? A. A statement that was written.

Mr. WORTHINGTON: The witness is referring to a statement that was prepared for her counsel.

By Mr. DARLINGTON:

Q. When was that paper prepared? A. That paper was prepared about the 29th of June, 1905.

Q. You read that over about six weeks before you testified?

162 A. More than that. It was at the time you expected to call me before, and I looked it over to refresh my memory.

Q. You refer to my expecting to call you. Do you mean your counsel? A. I mean by that, you collectively.

Q. You told us, at our last session, that the rents of the real estate, including the rents of the Lenman Building, were kept in the Metropolitan Bank in the joint account of the two administrators? A. Not all of them. We have accounts in two banks. The statement I made was that I was on my way to the Metropolitan Bank when I stopped to see Mr. Jones, and that I had less difficulty in finding the date, because I made deposits there less frequently.

Q. The rents of the real estate, then, including the Lenman Building, were kept in two banks to the joint account of the administrators? A. In two banks; yes, sir.

Q. When those rents were deposited in those banks, what was afterwards done with them? A. What was done with them in what way?

Q. Did you leave them there? A. Certainly we left them there until they were invested.

Q. How were they reinvested? A. In mortgages principally, in paying debts, in paying for repairs and things of that kind.

163 Q. You speak of having purchased some real estate in your own name recently. Were any of those purchases paid for, in part, out of these funds? A. No, sir; not those that belong to me. I have my own account and so has my mother, independent of the joint account.

Q. Do I understand that no one of these real estate purchases made by you since your father's death, was paid for out of the administration account, and the check signed by both of you? A. Yes, sir; there were several pieces paid for out of the estate, and the revenues from those go to the estate just the same.

Q. Although they stand in your name? A. They stand in my name; yes, sir.

Q. You stated that the tax bill would probably show the real estate belonging to the estate of your father? A. Yes.

Q. Let me hand you a tax bill for the year 1907, and ask you to state whether, so far as you know, that is a correct statement of the real estate standing in your father's name?

Mr. WORTHINGTON: May I ask what is the object of this testimony?

Mr. DARLINGTON: When the witness answers I will state the object.

Mr. WORTHINGTON: Not seeing that it has any relevancy to this issue, I object to it on that ground.

A. This is not the whole of the property, because the county taxes are not here.

164 Q. This is correct so far as the city property goes? A. So far as I can remember.

Mr. DARLINGTON: I offer this tax bill in evidence.

The above mentioned tax bill is filed herewith and marked "Ex. I. O. B. Cross Ex. No. 1."

Mr. WORTHINGTON: Now I will ask you to state what your object is?

Mr. DARLINGTON: Since you have taken your objection, perhaps it is unnecessary to state the object.

Mr. WORTHINGTON: Then I repeat my objection.

Mr. DARLINGTON: I will state it on the record later.

Q. I now hand you a tax bill of property assessed in your own name, and ask you whether that is property purchased by you since the death of your father? A. I owned one piece of property, if not more, before my father's death. A part of this, that in square 672, belongs to the estate.

Mr. WORTHINGTON: I make the same objection with regard to this testimony and as to any testimony about a tax bill.

The WITNESS: I do not remember about the squares and lots; but I believe a part of that property belongs to the estate.

By Mr. DARLINGTON:

Q. Can you state what property mentioned on this last bill you owned, before your father's death? A. I think it was property in square 316. I really am not sufficiently informed about the

165 number of the squares and lots to be able to identify them; but I can tell you the houses. I will say that all the taxes are paid from the estate, both those in my own name and in my mother's name.

Q. And paid from this administrator's account? A. And paid from the administrator's account, for the reason that I do the bookkeeping and all that sort of work, and it is a sort of compensation to me to have the taxes on my property paid by the estate.

Q. Do I understand that you regard some of the property which stands in your name as belonging to the estate? A. Yes, sir.

Q. But you cannot indicate from this bill, which property that is? A. I cannot tell you that. The property in square 672 is a part of the property belonging to the estate.

Mr. DARLINGTON: I offer this tax bill in evidence.

The above mentioned tax bill is filed herewith and marked "Ex. IOB Cross Ex. No. 2."

Mr. WORTHINGTON: I make the same objection.

By Mr. DARLINGTON:

Q. During your interview with Mr. Jones, do you remember expressing your surprise that he had not come to you about the purchase of the property? A. It is very likely that I said that.

Q. Do you remember saying it? A. I cannot say I did; but it is very possible.

166 Q. Why were you surprised that Mr. Jones did not come to you? A. Because Mr. Jones had approached me before, through Mr. Coumbe.

Q. When was that? A. I could not say; but a number of times.

Q. Do you remember what reply you made to him, through Mr. Coumbe? A. That I did not wish to sell.

Q. What property was it he approached you about, through Mr. Coumbe? A. The Lenman Building.

Redirect examination.

By Mr. WORTHINGTON:

Q. When you made these replies to Mr. Jones, through Mr. Coumbe, will you state whether or not you conferred with your mother before making the replies? A. I always conferred with my mother in regard to that property. In fact I conferred with her about all the property, but more especially about that.

ISOBEL H. LENMAN,
(By the Examiner, by Consent.)

167 WILLIAM E. EDMONSTON, a witness of lawful age, called by and on behalf of the defendant, having been first duly sworn, is examined

By Mr. WORTHINGTON:

Q. You are a member of the bar of the District of Columbia? A. I am.

Q. Did you know John T. Lenman? A. Yes, sir; very well.

Q. Were you his counsel at any time before his death? A. I was, for a number of years before his death.

Q. Up to what time? A. Up to his death.

Q. Did you have any talk with him as his counsel, in reference to a will or anything else that involved a reference to the Lenman Building?

Mr. DARLINGTON: I object to any parole testimony as to conversations with Mr. Lenman about the will as being incompetent and inadmissible either to charge the complainant or to affect the title to real estate.

A. I did.

Q. Please state how long it was before his death, and what was said. A. Some little while before his death, possibly a year or more, and I cannot fix precisely the time, he had a talk with me about mak-

ing his will, and he stated he had about concluded it was not
168 necessary to make a will, as he had only his wife and daughter and he thought he would or had indicated a scheme of division between them. He said he felt satisfied they would carry out that division. My recollection is that he indicated two pieces of property, the Lenman Building as intended for his wife and the 14th street property as intended for his daughter. He may have mentioned certain other property that he intended to divide.

Mr. DARLINGTON: Is it understood that my objection applies to the answer and to each part of it, as well as to the question?

Mr. WORTHINGTON: Yes; and to everything else in the same line.

By Mr. WORTHINGTON:

Q. Do you recall whether that was all that occurred with reference to that matter, before his death? A. Practically all. I think he concluded that it probably was not necessary for him to make a will.

Q. Will you please state whether you had any conversations with reference to that matter with his widow and daughter, after his death?

Mr. DARLINGTON: The same objection.

A. I was applied to by Miss Lenman on behalf of herself and her mother to prepare a petition for letters of administration. I then made inquiry as to whether or not Mr. Lenman had, in fact, either made a former will or left any paper, that might be possibly effectual as a will or disposition. I made this inquiry in order to intelligently prepare the application for letters of administration or letters testamentary, as the facts might develop. My recollection is that
169 I was then shown, either in a book or in a paper that was in a book, in Mr. Lenman's handwriting, a scheme of division. That scheme, as I recall it, as to these two pieces of property, was as he had intended, that is the Lenman Building was for Mrs. Lenman and the 14th street property for Miss Lenman.

Mr. DARLINGTON: The same objection to the answer, and a motion to strike it out.

By Mr. WORTHINGTON:

Q. Tell us what, if anything, to your knowledge, took place between the widow and daughter with reference to carrying out that scheme, so far as the Lenman Building and the 14th street property were concerned? A. As I recall it, I think there was some suggestion as to preparing a paper and that I advised them it was unnecessary to make a formal paper carrying out that division, inasmuch as Miss Lenman would be the only heir of her mother, and inasmuch as Miss Lenman could, by her will, provide absolutely for her mother, in case Miss Lenman should pre-decease the mother. So that I did not regard it as essential to carry out this division, by any formal papers.

Mr. DARLINGTON: The objection to the answer is renewed, and the same motion made.

By Mr. WORTHINGTON:

Q. Have you been counsel for Mrs. Lenman and for Miss Lenman since then? A. I have.

170 Q. Do you know, of your own knowledge, as to whether or not they carried out that intention or had any understanding about it between themselves, without papers being prepared? A. I have always understood that they did. They speak of the one property as belonging to one and the other property as belonging to the other.

Mr. DARLINGTON: I object to testimony as to understandings, as being additionally incompetent.

Mr. WORTHINGTON:

Q. Will you state upon what your understanding is based? A. I have had frequent talks, especially with Miss Lenman, in which the matter would be mentioned in a casual way, you know—"the 14th street property is my property."

Q. Do you know Mr. Hoover, who is connected with the National Safe Deposit Savings and Trust Company? A. I do.

Q. What is his full name and his position? A. His full name is William D. Hoover, and he is vice president and trust officer now of the National Safe Deposit Savings and Trust Company.

Q. Did he hold those positions at the time of the tender which has been referred to in this evidence, made in your office? A. He was trust officer of the company at that time and, I think, vice president, but I am not sure whether or not he was vice president.

Q. Was he, after that meeting. A. He was, after that

171 meeting.

Cross-examination.

By Mr. DARLINGTON:

Q. Do you mean the meeting in May, when the tender was made? A. Yes.

Q. When had you last seen Mr. Hoover prior to that time?

Mr. WORTHINGTON: I object to that as not proper cross examination, and I notify counsel that if he enters into that matter he makes the witness his own.

A. I could not say, because I see him quite frequently at the office.

Q. At what office? A. At our office. He comes down there quite frequently on matters relating to real estate transactions. You do not mean with respect to this particular matter, do you?

Q. I will ask you that? A. I think I saw him on the 8th of May, 1905, with reference to this matter. He called at the office to inquire about this deed, and whether it had been executed.

Q. Had you seen him prior to that in connection with the purchase or the proposed purchase of the Lenman Building?

Mr. WORTHINGTON: I repeat the objection, and repeat the notice above given.

172 A. I saw him some week or ten days before that, probably. He called at the office and inquired of me whether I knew whether or not the Lenman Building was for sale. I told him that I had heard nothing about it being for sale and advised him to see Miss Lenman or Mr. Peak, and that if it was for sale they would know about it; but I did not.

By Mr. DARLINGTON:

Q. Please state as fully as you can what this memoranda was which you say you think you saw in the book or paper—just what the language was?

Mr. WORTHINGTON: I object to that question, because as I understand it, the witness did not express any doubt as to whether he saw the paper, his only doubt being whether he saw a book or a paper.

A. As I recall, it was a memoranda giving the initials of the wife and daughter, to the daughter so-and-so——

Q. By "so-and-so" you mean some lots in some square? A. The lot and square, or it might have been by the designation by which it was generally known.

Q. Such as the Lenman Building? A. Such as the Lenman Building or the 14th street property? I think it was just in that way.

Q. And that was all? A. That is my recollection about it.

Q. Mr. Edmonston, your company was called upon by Mr. Jones, to furnish a certificate of title for this property; was it not?

173 Mr. WORTHINGTON: The question is objected to as not proper cross examination, and I give notice to counsel that he makes the witness his own on this subject.

A. I do not think Mr. Jones saw me about that. I think Mr. Hoover saw me about it.

Mr. WORTHINGTON: I withdraw my objection.

By Mr. DARLINGTON:

Q. Have you not stated that you saw Mr. Hoover about the 8th of May, and that the last preceding time you saw him was before you saw this contract with Mrs. Lenman? A. Yes; the order for that certificate was given on the 2nd or 3rd of May. That was given before there was supposed to be any controversy about the matter.

Q. Was it given before or after Miss Lenman had conferred with you about her signing this contract of sale? A. I think it was the day after.

Q. So that if the contract of sale was made on the 3rd, you did not get this order on May 2nd; did you? A. The order for that certificate was given the day after that contract was signed.

Q. Was the order given to you? A. It was given to me.

Q. Personally? A. Personally.

Q. Was it in writing or verbal? A. No; it was verbal.

Q. Please look at this paper which I now hand you and state whether this is the certificate which you furnished, and whether the signature "William E. Edmunston" is yours?

174 A. Yes, sir; that is my signature.

Mr. DARLINGTON: I offer this certificate in evidence.

It is agreed, by and between counsel, that a copy of said certificate may be inserted in the record in lieu of the original, the original to be produced at the hearing if desired.

The said certificate is in the words and figures following, to wit:

Certificate of Title.

Dated MAY 6, 1905.

Case No. 38,172.
Issued to —— ——.

The Real Estate Title Insurance Company of the District of Columbia and The Columbia Title Insurance Company of the District of Columbia,

Corporations in consideration of Thirty Dollars, to them paid by —— —— do hereby certify —— unto said —— —— that it appears of record —— at the date hereof the title to Lots Four (4) Five (5), Six (6) and Seven (7) in the subdivision of Square Two hundred and twenty-two (222) made by the heirs of John Davidson, as per plat recorded in Liber N. K. folio 95 of the Surveyor's Office Records of the District of Columbia situate in the City of Washington, in said District of Columbia, is as reported in the

175 opinion set out in Schedule "A" hereunto annexed; and is not now charged or affected by any pending suit *a* law or in equity or by any existing lien or incumbrance of any kind whatsoever appearing of record, except as reported in said opinion.

The Assessor of the District of Columbia will certify as to unpaid taxes and assessments.

THE REAL ESTATE TITLE INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA.
W. E. EDMONSTON, *President.*

THE COLUMBIA TITLE INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA.
W. E. EDMONSTON, *President.*

Attest:
GEORGE G. McELWEE, *Secretary.*

SCHEDULE "A."

Opinion.—I have examined the title to the property described in Caption and find the same to be good, according to the record in Isobel H. Lenman, as only child and sole heir at law of John T. Lenman, deceased, subject to dower right of his widow Jeannette R. Lenman,—both of whom should unite in any deed.

W. E. EDMONSTON, *President.*

May 6, 1905."

176 Q. I observe that the opinion, signed by you, is as follows: "I have examined the title to the property described in caption and find the same to be good, according to the record in Isobel H. Lenman, as only child and sole heir at law of John T. Lenman, deceased, subject to dower right of his widow Jeannette R. Lenman,—both of whom should unite in any deed."

A. Yes; that is a correct statement of the record. According to the record Miss Lenman was sole heir, and Mrs. Lenman had a dower interest in it.

Q. Did you give any further indication of title to the parties by whom you were employed, in connection with this certificate, at that time? A. At the time that was issued?

Q. At the time you delivered this certificate? A. That was not really written up until quite recently, and it was dated back, as of that date.

Q. How is that? A. I say the certificate, as a matter of fact, was not written up. I reported verbally to Mr. Hoover that the title was all right, and that a deed from the two ladies would pass a good title, and I then prepared the deed. As a matter of fact the certificate was not written up until just recently.

Q. Did you give Mr. Hoover, or whoever you did report to,
177 the same information that is in this certificate? A. Practically; yes, sir.

Q. Did you give them any additional information? A. No. I prepared the deed accordingly, in which both were to unite.

Q. You stated that the matter of these properties and the rights of these ladies in them, were mentioned in a casual way, from time to time, after Mr. Lenman's death. Can you recall any mention by either of that subject, until this difficulty occurred? A. I could not identify the time or possibly the occasion of it. Miss Lenman would speak of the 14th street property as being hers, and she would differentiate between what was her property and what was her mother's property.

Q. What did she say that was differentiative? A. She would say: "You know that is my property, and that is my mother's property."

Q. When did she say that, and what property did she say was hers and what her mother's? A. I do not remember except about these two particular pieces of property.

Q. When did she say the 14th street property was hers, and in

what connection did that come out between you, prior to this controversy. A. I think it probably came up in connection with the street extension, in general conversation about extending 14th street through that property.

Q. Can you recall any occasion when she spoke of the Lenman Building being her mother's prior to this transaction; and if so what was the occasion? A. No; I do not recall any special
178 occasion, after the first interview in reference to the proper division of the property and the getting out of letters of administration.

Q. Do you recall any occasion, either general or special, on which she spoke of the Lenman Building as belonging to her mother, between those two dates, and if so please state what it was? A. No, I do not recall any special occasion.

Q. My question relates to both special and general occasions? A. No; I cannot recall any particular occasion or any general occasion, except that in a general way she spoke about the division of the property between them.

Q. How or in what connection did the question of the division of the property between them come up, after you had advised them to make no division of the property, as you have testified? A. As I say, only incidentally.

Q. What incidents do you recall which would bring up that question? A. Well, as to the disposition of the 14th street property, Miss Lenman would say, "You know that is my property," and she might have added——

Mr. DARLINGTON: I object to what might have happened unless you recall it.

WILLIAM E. EDMONSTON,
(By the Examiner, by Consent.)

179 ALBERT T. COUMBE, a witness of lawful age, called by and on behalf of the defendant, having been first duly sworn, is examined.

By Mr. WORTHINGTON:

Q. What is your residence? A. 905 N street northwest.

Q. How long have you lived in Washington? A. All my life.

Q. Are you a real estate agent? A. Yes, sir.

Q. Where is your office? A. No. 1425 New York avenue.

Q. How long have you been engaged in business as a real estate agent? A. For about 18 or 20 years.

Q. Your office, I believe, is in the Lenman Building? A. Yes, sir.

Q. How long have you been in that building? A. For about 18 years.

Q. You know the defendants in this case, Mrs. Lenman and her daughter? A. Yes, sir.

Q. Have you represented them, or either of them, in the collection of the rents of the Lenman Building? A. Yes, sir; both of them.

Q. During what period? A. Since the death of Mr. John T. Lenman. I had charge of the building before his death,
180 and since his death I have had charge of the stores under the Lenman Building.

Q. By whom have the leases to the tenants usually been signed, while you have been agent? A. The leases have been made in my name, with one exception.

Q. Have you the exception deed here, or a duplicate of it? A. Yes, sir; I have the original in my pocket.

Q. Please let me see it. A. Yes, sir. (The witness produces a deed from the defendant Isobel H. Lenman to the United States Fidelity and Guaranty Company, dated November 28, 1906, and signed Isobel H. Lenman.)

This paper counsel for the defendants hands to counsel for the complainant, in response to his call made at the last meeting.

By Mr. WORTHINGTON:

Q. Had you any personal knowledge of efforts made by the National Safe Deposit Savings and Trust Company of the District of Columbia, of which the complainant, Mr. Jones, is president, to acquire the Lenman building, or any part of it, prior to May, 1905? A. Yes, sir.

Q. Please tell us all about that in the order in which it occurred, as well as you can recall it. A. Prior to the remodelling of the Jones Building, the bank on the corner, he asked me if the Lenman
181 Building was for sale. I told him I did not know but would consult with the owner. I did so and saw Mrs. Lenman, or rather I think I met Miss Lenman in the parlor first and mentioned it to her, and she said: "I will speak to mother." I think Mrs. Lenman came in and then I mentioned that Mr. Jones had asked me if the Lenman Building was for sale and she said——

Mr. DARLINGTON: I object to any conversation with either of the ladies, in the absence of the complainant, as incompetent.

The WITNESS (continuing): Mrs. Lenman said: No, the Lenman Building was not for sale, and both the ladies agreed to that. I reported the answer to Mr. Jones. Mr. Jones then asked me if they would sell a part of it, that is, the Fussell part, which I think, is about 25 feet front by the depth of the lot. I told him I would report that, which I did, to Mrs. Lenman, and I think Miss Lenman was present at the same time; and it was declined. She said, no, the Lenman Building was not for sale. That was, I suppose, four or five years ago. Several times, prior and since I have been approached by various people about the sale of the Lenman Building and I have reported the matter to Mrs. Lenman and Miss Lenman, and they have invariably said that the Lenman Building was not for sale.

Q. As nearly as you can fix it, when was it that Mr. Jones first spoke to you on this subject? You said it was prior to the remodelling of something. A. Yes.

182 Q. What do you mean by that? A. Four or five years ago, I think, the building on the corner, the bank building, was remodelled and bay windows were put out on 15th street. The interior of the bank room was changed. I think it was prior to that time. It might have been four or five years ago. I did not charge my mind with it and do not know the exact time.

Q. In those conversations with Mr. Jones, will you tell us what, if anything, he said to you as to whether he was speaking for himself or somebody else? A. No; he made no communication about who it was for, I understood it was for himself or the bank.

Mr. DARLINGTON: I object to the testimony of the witness as to his understanding as incompetent.

By Mr. WORTHINGTON:

Q. What is the Fussell part, to which you have referred? A. It is a 25-foot front store, which runs through to the alley in the rear.

Q. Is it any part of the Lenman building? A. Yes, sir.

Q. Is it not a part of the Lenman Building adjoining the bank? A. Yes, sir; it adjoins the bank building.

Q. Do you remember anything being said to you, in that connection, about enlarging or intending to enlarge the *the* bank building?

183 A. I cannot recall it at this time. My best recollection is, though, that they wanted to enlarge the bank building because the first floor banking room was not large enough for their uses.

Q. Do you mean that is what Mr. Jones said to you, or what you heard someone else say? A. No; I have had no conversation with anyone but Mr. Jones, except to report it to Mrs. Lenman and Miss Lenman, and I got that idea from him. Of course this was five or six years ago and I do not remember what the exact conversation was.

Q. We can only ask you to give your best recollection of the substance of what took place. A. My best recollection is that he wanted it for the purpose of enlarging the bank building.

Q. You mean that he told you that? A. Yes; or by inference—that they had not room enough.

Q. Have you any personal knowledge as to the understanding between the two ladies as to the ownership of the Lenman Building?

Mr. DARLINGTON: Is it understood that my objection may apply to all of this line of examination without being reiterated, and also apply to the answers?

Mr. WORTHINGTON: Of course.

A. I have always understood that this particular building belonged to Mrs. Lenman.

Q. How did you get that understanding? A. In this number of years and in frequent conversations, when I would apply, as

184 I have done, on a number of occasions, to them to sell the Lenman Building I would always talk to Mrs. Lenman. Sometimes I would meet Miss Lenman in the parlor and was generally referred to her mother,—"See mother."

Q. In that connection and in that way did either of them say any-

thing as to whose property it was? A. Well, I generally understood that it belonged to Mrs. Lenman.

Mr. DARLINGTON: I object specially to this answer and move to strike it out.

By Mr. WORTHINGTON:

Q. The question is whether either of them said anything to you on that subject. A. Well, only by inference. I don't remember that Mrs. Lenman or Miss Lenman said that it positively belonged to her any more than I know that the Brightwood property of about ten acres—I have always understood that that belonged to Miss Lenman and also that the Lenman Building belonged to Mrs. Lenman. Of course I had no reason to pry into it and ask them their reasons.

Q. Did you have any information from anybody except Mrs. Lenman and Miss Lenman about who owned the 14th street property and who owned the Lenman Building? A. No; only from Mrs. Lenman and Miss Lenman. I have always understood that Miss Lenman owned the Brightwood property. I think there are about ten acres out there, because during the condemnation proceedings I went out there several times with Miss Lenman, and that was her property.

185 Q. Did Mrs. Lenman at any time do anything to indicate that she was claiming to exercise ownership over the 14th street property? A. No, sir; Mrs. Lenman did not.

Q. Did Miss Lenman, at any time, do or say anything to indicate that she claimed or exercised ownership over the Lenman Building? A. No, sir.

Q. What was the report that you made to Mr. Jones about his proposition or propositions to buy the property? A. I told him that Mrs. Lenman declined to sell the property; that the property was not for sale.

Q. How clear are you that you told him Mrs. Lenman would not sell it? A. Because my conversation was with Mrs. Lenman. I think I met Miss Lenman in the parlor and she said: "I will call mother." Mrs. Lenman came in and said: "No, I decline to sell it."

Q. When, and through whom, did you first learn of the attempted sale which is involved in this litigation? A. Mr. James Lampton came to my office about the first or second day of May 1905 and asked me what was the rental of the Lenman Building. I told him I could not give him such information, and why did he ask it? He replied that he was negotiating a sale of the Lenman Building and that such information would be of material benefit to him in the negotiation. I still declined to give him the information un-

186 less I had the authority of the owners. He replied: Well, he had authority, and had proper authority; he had been in communication with the owners and the negotiations had been going on for several days. I told him that he would have to get authority from Mrs. Lenman or Miss Lenman. He said it was important to get the information at once as he had little time, because the prospective purchaser, Mr. Stilson Hutchins, was about to go abroad, and he would be glad if I could help him and give him the information.

I told him that if he would assure me he had the proper authority from the owners to sell the building—that I could only approximate the cost or rental of the Lenman Building. He said he would give me that assurance. He said if he could use the 'phone he would get it over the 'phone from Miss Lenman. He did use the 'phone and Miss Lenman was not in. I think they said she had gone to Cleveland Park or to Chevy Chase somewhere. He assured me that he had the proper authority. I took a book from my safe and looked at two or three months and I told him that the rental was from four to five, or six, or possibly ten thousand dollars a year. He said that would satisfy him and he went away from my office.

Q. Did you see Mr. Lampton about it any further? A. In the course of a day or so, I think it was Wednesday or perhaps Thursday of that week, and I think Thursday, Mr. Lampton came back to my office and said that he had consummated the sale of the Lenman Building and would like to have me give him or would like to see the leases to the stores. I declined to give them to him and
187 told him I could not give them to him even if he had sold the building, until I had the proper authority. He left and, at that time, I did not give them to him. I subsequently called Miss Lenman over the 'phone and asked her if I should give the papers to Mr. Lampton, and she said no.

Q. When Mr. Lampton came on the second occasion did he say anything to you about there being any reason for haste or hurry? A. I don't remember that he did. It was on the first occasion that he urged the necessity for haste, for the reason that the prospective purchaser was about to leave the country and about to go abroad.

Q. Did he mention the name of the purchaser to whom he referred? A. He mentioned the name of Mr. Stilson Hutchins as the purchaser.

Q. After Mr. Lampton called on you the first time did you see Mrs. Lenman or Miss Lenman about the matter? A. Not in the interval between the first and second call by Mr. Lampton.

Q. When did you see them in regard to this matter? A. I went to Mrs. Lenman's house on Friday morning, I think, of that week, about the 7th of May, and there I met Mr. Peak and I think Mr. Edmonston came in after I was there a few minutes.

Q. Can you tell us what took place there? A. Miss Lenman seemed to be very much disturbed and worked up over the matter. There was a general conversation about the matter and Miss
188 Lenman said she could not understand—I think she used the word hoodooed. She was very much disturbed about it and there was a general conversation there——

Mr. DARLINGTON: I object to any testimony as to conversations at this time, as incompetent against the complainant.

By Mr. WORTHINGTON:

Q. I want to get at whether anything was said by Miss Lenman about advice she had asked of Mr. Edmonston. A. I think Miss Lenman did say, as Mr. Edmonston came in: "Well, and this is the

gentleman of whom I ask advice and do not always get it"—or something to that effect.

Mr. DARLINGTON: I submit that, if the claim in this case is that the complainant is not entitled to the relief prayed because of the failure of Mr. Edmonston to give advice, it is only fair to Mr. Edmonston and only fair to the complainant and to the court that he should have been interrogated about that. I desire to emphasize the fact that he was not interrogated about it and I am willing to have him recalled.

By Mr. WORTHINGTON:

Q. Now please proceed. A. There was a general conversation there.

Q. Do you remember Miss Lenman coming to see you about that time? A. Yes, sir.

189 Q. When was that? A. That same morning Miss Lenman came to my office and said she was going in to see Mr. Jones, in the bank. She did go in to see Mr. Jones and returned to my office again.

Q. Was there any conversation between you and her, at that time, as to who was the purchaser? A. Yes, sir.

Q. Who was he?

Mr. DARLINGTON: I object to any testimony between this witness and Miss Lenman as to who was the purchaser. I submit that counsel cannot seriously think that is competent evidence.

A. I think it was understood that Mr. Jones was the purchaser.

Mr. DARLINGTON: I object to the answer and move to strike it out.

By Mr. WORTHINGTON:

Q. Did you say anything to her, at any time, as to what you had been told by Mr. Lampton, with reference to Mr. Hutchins being the purchaser? A. I think I told her at that time, as it was a surprise to me, that I had understood Mr. Hutchins was the purchaser.

Q. Do you recall whether or not you had told her what Mr. Lampton had said about Mr. Hutchins being the purchaser, before you saw her when she was on her way to Mr. Jones' office? A. I am not

190 positive whether it came out in the parlor at Mrs. Lenman's house that morning or not.

Q. With reference to the lease that has just been produced, signed by Miss Lenman, what is the explanation, if there is any, of the reason why she signed that particular lease, when you signed all the others? A. Five years ago when the representative of this Fidelity Company of Baltimore, Mr. Swormstedt, applied for the lease, he said that his company in Baltimore would prefer to have Miss Lenman sign the lease. I submitted the matter to Miss Lenman and she said she had no objections, and she did sign the lease, but just merely because he requested it. This is the second five years, and of course the same procedure was followed.

Q. Do you know Mr. Peak, who had some connection with this transaction? A. Yes, sir.

Q. What, if any, communication did you have from him in regard to this sale, before it was closed? A. None.

Q. What information or knowledge did you have from any source that negotiations were going on, until Mr. Lampton came to your office and spoke to you about it, as you have stated? A. A gentleman by the name of Bernard Duke came to my office, I think, a few days before Mr. Lampton did, and he said he understood that the Lenman Building was about to be sold. I replied that I thought there was a mistake, because a short time before——

191 Mr. DARLINGTON: I object to any conversation between this witness and Mr. Duke.

Mr. WORTHINGTON: I do not care to go any further in that matter, if counsel objects.

Q. Had you any knowledge of anybody from the bank of which Mr. Jones was president, going around that building, for any purpose? A. No; no personal knowledge.

Cross-examination.

By Mr. DARLINGTON:

Q. Your connection with these ladies has been the renting of stores and offices in the Lenman Building? A. Yes, sir.

Q. Have you had any other business relations with them? A. What?

—. ——. A. Renting other properties.

Q. What other property? A. The property No. 1141 12th street, the property 625 Massachusetts avenue, a piece of property on the corner of 9th and O street—and some L street property between 11th and 12th, I have endeavored to get tenants for. I have also endeavored to get tenants for various other properties, a piece on I street, I think, near 2nd and 3rd, and other properties.

Q. That has been the general character of your relations with them? A. Yes, sir.

192 Q. Renting their property and trying to get tenants for them? A. Yes, sir.

Q. What properties were in your hands for this purpose in May 1905? A. In 1905, all the properties that I speak of except the L street property between 11th and 12th and the I street property near 3rd.

Q. Just mention, if you can, the properties other than the Lenman Building, which were in your hands at that time. A. 625 Massachusetts avenue, 901 O street, and 1141 12th street I think, and the Ralston Building at 612 F street. That is all, except the Lenman Building.

Q. How frequently did you render them statements as to the rents from these properties? A. Just as soon as I collected the rent.

Q. I mean monthly or quarterly? A. Monthly, or semi-monthly. For instance, as soon as I get the rent of the Ralston Building I turn

it over. I turn over the rents of the Lenman Building as soon as I get them.

Q. Look at the paper I now hand you, dated February 20, 1893, and state if that is the general character of statement which you submit to these ladies? A. Yes, sir.

Q. You observe that is stamped "Isobel H. Lenman—es-
193 state of John T. Lenman"? A. Yes, sir; and I think some of my statements at the present time are made to Miss Isobel H. Lenman.

Q. Since when? A. I cannot state since just what time. My checks are all made out that way.

Q. To whom? A. Miss Isobel H. Lenman, and I see, when they come back from the bank, that they are endorsed——

Q. Did you understand me to ask you how they were endorsed when they came back from the bank? A. The check is a part of that statement.

Q. I am simply asking you whether that is the general character of statement that you submit to these ladies, monthly or oftener? A. Yes, sir; with the exception I speak of.

Q. Are you interested in this case in any way? A. Not in the least, sir, only in the commission that I get.

Q. How do you explain your action in trying to tell me now what your checks show when they come back, when I did not ask you anything about that? A. As my check is a part of that statement, to balance the account, I simply wanted to answer your question in full.

Q. You honestly thought that the endorsement on the back of a check had something to do with the statement? A. Why, it is a part of the statement.

194 Q. Point out in the statement what there is which refers to the endorsement on your check. A. There is nothing in the statement with regard to the endorsement.

Q. Have you taken an active interest in endeavoring to defeat this suit brought by Mr. Jones? A. Why, I have no reason to take any active interest.

Q. And you have taken none? A. I cannot say that I have taken any, except to discuss the matter at various times with Miss Lenman.

Q. Have you attempted to get evidence for her? A. Only to the extent of—no, I have not endeavored to get any evidence for Miss Lenman.

Q. Have you endeavored to get any evidence to be used in this case? A. I tried, from the newspaper accounts, to familiarize myself with the value of the property by the recent sales.

Q. Only from newspaper accounts? A. And interviews with various people in respect to property.

Q. Why were you doing that? A. I was doing that to become familiar with the value of the Lenman Building and property in that neighborhood.

Q. And why? A. Well, I believe that—I believe that——

Q. That what? A. I wanted to familiarize myself with
195 the value, relatively speaking, of the price at which the Lenman Building sold with the value of property in the immediate vicinity.

Q. I am asking you why? A. For my own satisfaction.

Q. And for that purpose only? A. Well, I may say—yes.

Q. For that purpose only? A. Not with a view of getting any evidence in this case. I have asked for no witnesses and never tried to get any witnesses.

Q. You were not seeking this information with a view of getting witnesses to be heard in this case? A. No; I didn't try to get any witnesses.

Q. Who are the parties you refer to as having been interviewed on this subject? A. I spoke to Mr. Walker.

Q. What Mr. Walker. A. Mr. Walker, on 15th street, who had purchased a piece of property on 15th street between New York avenue and H street.

Q. Did you tell him you might want him as a witness in this case? A. No, sir.

Q. You said nothing to him about being a witness in this case? A. No, sir.

196 Q. Nor about being a witness as to the value of the property? A. No, sir.

Q. Which Mr. Walker was that? A. I think his name is W. H. Walker.

Q. Is it of the firm of R. W. Walker & Son. A. Yes.

Q. Was it R. W. Walker or the son? A. It was the son. He purchased a piece of property there, and I told him that I would like to know what he paid for his property, because I wanted to become familiar with the value of property in that vicinity.

Q. Did you ask him the value of the Lenman Building? A. It is likely I did.

Q. Do you remember? A. I don't remember that he made any reply. I don't remember. I won't say I asked him the value of the Lenman Building. It is possible I did, but I won't say that I did.

Q. Did you ask him whether $200,000 was an adequate price, and whether he would so testify? A. I don't recollect that I did. I don't think I did.

Q. Whom else did you interview on the subject? A. I don't know. I have mentioned it to various people about town.

Q. I am asking you what persons you interviewed with respect to the value of the property, as you have stated you interviewed several? A. I think I mentioned it to Mr. Charlie Glover, of Riggs Bank. I asked him what was the value of his property on New York avenue adjoining the Lenman Building.

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Q. Did you ask him what the Lenman Building was worth? A. Yes; I think I did.

Q. Did you ask him whether he thought the price of $200,000, mentioned in this contract, was inadequate? A. No, I did not. Because I did not tell him about it. Mr. Glover said his property was not for sale, and he did not know what the value of the property was.

Q. Is there any other person you can recall? A. There are no names now that come to my mind of anybody I interviewed about the value of it.

Mr. DARLINGTON: I offer in evidence this statement of rents dated February 20, 1895, it being understood that further statements will be produced as agreed.

Mr. WORTHINGTON: I now ask counsel for what purpose he offers that statement, in order to see whether I care to object to it.

Mr. DARLINGTON: I offer it to show, for one thing, that this witness rendered statements not to Mrs. Lenman but to Miss Isobel Lenman—the estate of John T. Lenman.

Mr. WORTHINGTON: That is one purpose. Is there any other purpose for which you offer it?

Mr. DARLINGTON: If there is any other purpose for which it is competent, I do not intend to preclude myself from using it.

198 Mr. WORTHINGTON: Then, as I conceive it is intended to be used in indicating the value of the property, from the amount of rents received, I object to the introduction of the paper in evidence for any other purpose, because the fact that it was rendered to Isobel H. Lenman is the only purpose for which it is competent. I further object to it for the reason that not by the issues in this case or under the evidence taken on behalf of the complainant is the question as to the value of this property entered into.

I give notice that I will move the court, for that reason, before the hearing to withdraw the paper from evidence.

The above mentioned statement is filed herewith marked Exhibit A. T. C. Cross Ex. No. 1.

By Mr. DARLINGTON:

Q. You have stated that this lease, which you have produced, between Miss Lenman and the United States Fidelity and Guaranty Company is not the first lease between these parties? A. No, sir; it is the second.

Q. Where is the first one? A. At my office.

Q. Will you produce that? A. I will. It has expired.

Mr. DARLINGTON: That can be sent down to the examiner and copied into the record, and the original returned.

The WITNESS: As this is a live lease I would rather keep

199 this. This is an original, and the lessee has the duplicate.

Mr. DARLINGTON: I offer this lease in evidence.

The above mentioned lease is marked Exhibit A. T. C. Cross Ex. No. 2, and is in the words and figures following, to-wit:

"This agreement, Made by and between Isobel H. Lenman, of the city of Washington, District of Columbia, and the United States Fidelity and Guaranty Company, a body corporate, duly created, organized and existing under the laws of the state of Maryland, and as such doing business, among other places, in the District of Columbia, under the provisions of an Act of Congress entitled "An Act relative to recognizances, stipulations, bonds, and undertakings and to allow certain corporations to be accepted as surety thereon," approved August 13th, 1894; whereby the said Isobel H. Lenman has agreed to let, and does hereby let, to the said United States Fidelity and Guaranty Company, as a tenant, the storeroom and cellar, known as No. 1423 New York Avenue, Northwest, in said city, for

the term of five (5) years, subject, however, to the certain contingency herein below mentioned, commencing on the first day of December, A. D. 1906, at and for the yearly rental of eighteen hundred dollars ($1,800.00) per annum, payable in monthly payments of one hundred and fifty dollars ($150.) per month, in advance, at the office of Albert T. Coumbe, #1425 New York avenue, Northwest, in said city, that is to say, on said first day of each and
200 every month during which the tenancy may continue, as rent in advance for the next ensuing month.

And the said United States Fidelity and Guaranty Company has agreed to take, and does hereby take and hold the said premises as a tenant, for the term aforesaid, at the said rent, payable as aforesaid, and agrees that it will pay the water rent and gas bills as they become due, and that it will not sublet or assign the said premises, or carry on any business therein, except that of an office business of the said United States Fidelity and Guaranty Company, without the written consent of the lessor, or use the same for any disorderly or unlawful purpose.

Provided always, that if the said lessee shall fail to pay the said rent in full in advance as aforesaid although there should have been no legal or formal demand for any rent whatever, or shall neglect to pay the water rent or gas bills at the time and on the day when the same shall fall due and be payable, as hereinbefore mentioned, or shall sublet or assign the said premises, or carry on any business therein, except as above stated, without the written consent as aforesaid, or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants, then and in either of said events, this lease, and all things herein contained, shall cease and determine, and shall operate as a notice to quit, the thirty days' notice to quit being hereby expressly waived. And the lessor, her heirs and assigns, shall and may proceed to recover the possession
201 of said premises, under and by virtue of a seven days' summons under the provisions of the code of law for the District of Columbia, to regulate proceedings in cases between landlords and tenants; or by such legal process as may at the time be in operation in like case.

A. And be it further provided, that if under the provisions of this agreement a seven days' summons shall be served, and a compromise or settlement shall be made thereupon it shall not constitute a waiver of any covenant herein contained, or of the agreement itself. And the said lessee hereby agrees to deliver the premises in the same order in which it was received, usual wear and tear, fire and storm excepted; and it is hereby provided and agreed that no waiver of any breach of any covenant herein shall be construed to be a waiver of the covenant itself or of any subsequent breach thereof.

And it is further agreed, that in case the said demised premises shall be destroyed or be so injured by the elements, or any other cause as to be untenantable or unfit for occupancy, the tenant shall not be liable or bound to pay the rent to the lessor, during the period said premises are untenantable, and until the said premises are restored to their previous condition.

And it is further hereby agreed, that this lease is accepted by the

lessee with notice and knowledge of the certain litigation now pending in the Supreme Court of the District of Columbia, wherein decree of specific performance of an alleged contract of sale of
202 *inter alia*, the premises herein demised is sought and prayed against the lessor herein. In the event of the decision rendered in said litigation adverse to said lessor by said court as said lessor may elect to accept as final, this agreement of lease, including the unexpired term thereof, if any, at the time of such final decision, at last herein aforesaid, shall thereupon become and be fully determined and ended, without liability of any kind on the part of the lessor herein to said lessee, in respect to such unexpired term.

In testimony whereof, the said Isobel H. Lenman has hereunto set her hand and seal, and the said United States Fidelity and Guaranty Company, has duly authorized this agreement of lease to be entered into, and, in that behalf, has authorized and caused its corporate name to be signed by its president and its corporate seal to be affixed hereto, duly attested by its assistant secretary, this 28th day of November, A. D. 1906.

ISOBEL H. LENMAN. [SEAL.]
THE UNITED STATES FIDELITY
AND GUARANTY COMPANY.
JOHN B. BLAND, *President*, [SEAL.]

[Seal The United States Fidelity & Guaranty Company, Incorporated 1906.]

Attest:
W. W. SYMMINGTON,
Ass't Secretary."

By Mr. DARLINGTON:

Q. Is your recollection clear that Mr. Swormstedt said he would prefer to have Miss Lenman sign? A. Either that he would or his company would. I think he said he would.
203 Q. Did he mention Miss Lenman at all? A. I think he did.

Q. Is not this what he said: That his company did not accept leases from agents, and that they desired the owner to execute them? A. It is possible that he said such a thing.

Q. Is not that all he said, without mentioning who the owner was? A. I cannot say that he did, at this time. That was five years ago.

Q. Had he any knowledge at all, so far as you know, as to who the owner of the property was? A. Everybody knows who the Lenman Building belongs to, and of course I presumed that he did.

Q. You think everybody knows to whom the Lenman Building belongs? A. It is an old landmark.

Q. You say that Mr. Jones, prior to the remodelling of the bank building, asked you to ascertain if the Lenman Building was for sale? A. Yes, sir.

Q. To whom did you go to find out? A. I went to the house of Mrs. Lenman and there met Miss Lenman, I think, in the parlor, and broached the subject. She said: "Well, I will refer to mother." I think she called Mrs. Lenman into the room, and she said: "Now,

there is mother." I put the question from Mr. Jones to Mrs. Lenman and she declined, without hesitation, saying the- she did not want to sell the Lenman Building.

204 Q. What did Miss Lenman say? A. I think Miss Lenman had nothing to say only "There is mother."

Q. Why did you say, in -our testimony in chief, that both ladies said that the property was not for sale? A. Because it is probable there was a discussion between the three persons. I think it is likely, and I well remember on this occasion and other occasions——

Q. We are talking about this one question. A. On this occasion Miss Lenman said: "There is mother."

Q. Did not Miss Lenman also say that the building was not for sale? A. Possibly she did.

Q. I am not asking you about possibilities. A. I don't remember. The only thing I do remember is that Mrs. Lenman was very emphatic about it that time.

Q. You testified in chief that both ladies agreed that it was not for sale. A. Well, that may be so, too.

Q. Don't you know whether it is so or not, when you testify to it? A. I say that may be so.

Q. Is that all you can say about it—that it may be so? A. I say I think that Miss Lenman acquiesced and agreed with her mother at that time.

205 Q. Now with regard to the Fussell property. Do you or do you not remember that the only part of that property Mr. Jones asked you about was the rear part, so that they could widen the rear part of the bank building? A. No; because I emphatically remember that he said the Fussell property, 25 feet front.

Q. You know the shape of the bank building, do you not? A. Yes.

Q. You know that it has a wide frontage on New York avenue and runs on to 12 feet at the rear? A. I don't remember the number of feet, but I do know it runs off very narrow in the rear.

Q. Was it not the rear portion of the Fussell lot that he asked you if you could buy? A. No, sir; my recollection is that it was the Fussell property all the way through, and I so reported it to Mrs. Lenman, the second time.

Q. When he asked you about the Fussell property, whom did you see about it? A. I say that is the Fussell property?

Q. Whom did you go to see about it? A. I went to see Mrs. Lenman.

Q. And Miss Lenman? A. Mrs. Lenman and Miss Lenman—let me say that Mrs. Lenman, on account of her being not in perfect health, but not an invalid, and being an old lady, I met Miss Lenman generally.

206 Q. I am not asking you what you generally did. I am asking you if you did not go to the house and see Miss Lenman and ask her whether the Fussell property could be bought? A. I say I mentioned it to Miss Lenman and Miss Lenman referred me to her mother at that time.

Q. You went there and saw Miss Lenman to learn whether the Fussell property could be sold? A. Yes.

Q. You said nothing to her about her mother? A. No; but she called her mother in.

Q. I am asking you about what you did. You went to her and asked her if the Fussell property could be sold? A. Yes; and she referred me to her mother, and then I asked her mother.

Q. Did either of these ladies ever tell you that the Lenman Building belonged to the one or the other of them, and not to both? A. I can't say that they directly told me so.

Q. I am not asking that. I am asking you whether these ladies told you, directly, that the property belonged to one or the other, and not to both? A. Directly, no; indirectly, yes.

Q. Which one told you indirectly, and what was the indirect manner in which they told you? A. As a general thing, in my conversation——

Mr. DARLINGTON: I am not asking you about what happened as a general thing.

Mr. WORTHINGTON: I object to the witness being interrupted, even if the answer is not responsive. He has the right to
207 finish his answer.

Mr. DARLINGTON: If you will listen to the question and answer it will save us both a good deal of time.

Mr. WORTHINGTON: I will state to you that if, in your judgment what you are saying is in answer to the question, you have the right to go on and finish it.

By Mr. DARLINGTON:

Q. Which one of them told you indirectly, and what was the indirect manner in which they told you? A. Well, from conversations with both of them indirectly; or rather I got the idea from my various business relations with them, that Mrs. Lenman owned the Lenman Building.

Mr. DARLINGTON: I object to the answer and move to strike it out.

By Mr. DARLINGTON:

Q. I have not asked you what idea you got; but I ask you what either of the ladies said. A. Well, it has always been understood by me that Mrs. Lenman did own the Lenman Building, because for any great thing I would attempt to do there I would have to consult and confer with Mrs. Lenman, or if I did not, Miss Lenman would confer with her mother. Frequently, when Mrs. Lenman would not be able to be seen on account of ill health, Miss Lenman would say: "Well, I will confer with mother."

Q. Did you ever do anything of any importance without consulting Miss Lenman? A. No, sir; I never did anything of
208 any importance without consulting Miss Lenman with regard to the property.

Q. I am asking you about the Lenman Building. A. In the Lenman Building, I did not.

Q. You never did anything of any importance without consult-

ing both of them, did you? A. I would consult Miss Lenman and she would say: "I will see mother and let you know." If you want me to mention instances, this comes to my mind——

Q. My question is what was said. I am not asking you for inferences; but if anything was said by either of these ladies you may state it. Can you recall something? A. Yes; in regard to painting the front of the Lenman Building. I spoke to Miss Lenman—"I will refer to mother." I got competitive bids and submitted bids. I think I had several bids—"I will refer it to mother." Then the day after or a few days after she would give me an answer.

Q. Did you ever go directly to Mrs. Lenman about anything? A. Yes, sir.

Q. Without conferring with Miss Lenman? A. Yes, sir; sometimes when I would go to the house Miss Lenman would be out and then I would talk to Mrs. Lenman.

Q. What would she say? A. She would tell me to go ahead and do it or not, just as her judgment commanded.

209 Q. And you would do it? A. I would, yes; I would follow her instructions. That was some years ago. Recently I have not conferred with Mrs. Lenman, by reason of her ill health.

By Mr. WORTHINGTON:

Q. When you say recently, do you mean since May, 1905? A. Yes, sir; and some time prior to that.

By Mr. DARLINGTON:

Q. Did you not tell us a moment ago that you never did anything of importance without consulting both of these ladies? A. Not both of these ladies.

Q. Did you not so state here twice? A. No; I said I never did anything about that buliding without consulting Miss Lenman.

Q. And now you say you consulted Mrs. Lenman? A. You asked me the question whether I ever consulted Mrs. Lenman and I said: Yes; frequently I did.

Q. Now what is the fact? Did you ever do anything about the building without consulting Miss Lenman, the daughter? A. Yes; I have papered a little room or I would buy some coal or something of that kind.

Q. Without consulting anybody? A. Yes.

Q. But whenever you consulted either, you always consulted Miss Lenman as well as her mother; did you not? A. No, I have

210 stated that I could not always reach Mrs. Lenman on account of ill health and generally I have consulted Miss Lenman.

Q. You always consulted her, and sometimes both? A. Sometimes Mrs. Lenman alone, in prior years, but not of recent years.

Q. Can you recall anything of importance you ever did in connection with that building upon the authority of Mrs. Lenman, without consulting her daughter? A. No; I cannot just at this time, for the reason that I have not consulted Mrs. Lenman in regard to the business of that building recently.

Q. My question is not confined to recently. It refers to any time

since the death of John T. Lenman? A. I cannot call to mind anything.

Q. When Mr. Jones asked you to see whether you could buy the Lenman Building, did you make a report to him? A. I did.

Q. What did you tell him? A. I told him that Mrs. Lenman said the Lenman Building was not for sale.

Q. Was that what you told him? A. It may not have been in those words, but that was the tenor of the conversation.

Q. That the Lenman building was not for sale? A. Yes.

Q. When he asked you whether you could negotiate a sale of the Fussell part, what did you tell him? A. I told him I would make inquiry.

211 Q. After you did make inquiry, what did you tell him? A. I told him they also declined to sell that or any part of the Lenman Building.

Q. How do you fix the date at which Mr. Lampton came to you and asked you about the rental? A. Just as I would any other important event, in any other matter of great importance.

Q. That does not give me a very definite idea as to how you fix the date? A. I will tell you how I fix it, because it was a matter I was interested in and I conferred several times, at the time, with Miss Lenman, and have talked with her a great many times since.

Q. How soon after this first call by Mr. Lampton was it that you first talked with Miss Lenman? A. The first call of Mr. Lampton, I think was on Thursday of that week.

Q. And you talked with Miss Lenman on Thursday of that week? A. I think on Wednesday or Thursday I called up Miss Lenman. I wanted to be well fortified as to whether I should deliver up certain papers, and Miss Lenman replied no.

Q. That was after Mr. Lampton told you that he had already closed the contract? A. That was after he had told me that he had closed the sale; yes.

Q. Did you have any further conversation over the 'phone
212 with Miss Lenman, except to ask whether you should show him these papers? A. I think I did.

Q. When was the next time you saw her? A. The next morning at her house, Friday morning.

Q. What occurred in either of those conversations, which enables you to fix the date that Mr. Lampton first asked about the rentals of the Lenman Building? A. Because it was within a few days—there was no difficulty in fixing the date.

Q. What was the date on which you saw Miss Lenman at her house? A. It was on Friday, I think, the 5th day of May.

Q. What makes you think it was on the 5th day of May? A. Just as I would fix any important matter, as this was an important matter in my mind.

Q. If any matter is important, do you remember the date on which it occurs? A. Certainly I would. I would remember the date a child of mine was born. This was an important matter and I talked it over with my wife and with Miss Lenman.

Q. When? A. At that time.

Q. At the time Mr. Lampton asked for the statement? A. No; I say at the time this transaction was going on. Another important thing is that a gentleman came to my office and mentioned
213 that he understood the Lenman Building was for sale and I said it was not so because a few days before or perhaps ten days before I had broached the same subject to Mrs. Lenman.

Q. Who was that gentleman? A. Mr. Bernard Duke.

Q. When did he call? A. He called at my office a few days prior to Mr. Lampton.

Q. In what month and on what day? A. I cannot say the exact date, because I treated it so lightly. I did not believe in it and I told him; "Why, Bernard, I think there is some mistake."

Q. I am not asking you what you told him? A. I don't know the date.

Q. You do not remember the date of the birth of this Duke child at all? A. No; I do not remember the date of the Duke child.

By Mr. WORTHINGTON:

Q. You did not believe there was any child then? A. I did not think there was anything in it.

By Mr. DARLINGTON:

Q. And yet you called up Miss Lenman and asked her about it? A. No; not at that time.

Q. When did you ask her about it? A. I say that about ten days prior to the Duke visit I had seen Mrs. Lenman and asked
214 her about the sale. I think some real estate man wanted to know if the building was for sale.

Q. Who was he? A. I don't remember.

Q. When did he want to know? A. I don't know. I have had a great many men come in and ask me if this building was for sale.

Q. And you do not remember any of the dates, except the date of the Lampton visit? A. That was indelibly fixed in my mind.

Q. That is the only date you remember? A. And the date I was at Mrs. Lenman's house.

Q. Do you remember any date unconnected with the Lampton transaction? A. No; because they were all of no importance.

Q. Can you remember the year in which Mr. Jones asked you to see if you could buy this building? A. No I don't remember the year.

Q. You cannot remember the year of that? A. No.

Q. When did Mr. Lampton first call upon you in this connection? A. Mr. Lampton called. I think either on the first or the second day of May.

Q. What makes you think that? A. Why? Why do I think it?

Q. Yes. A. Well, because it was—I can give no reason, only it was an important matter. Then Mr. Lampton came in
215 again a day or so afterwards and said he had sold the building, and that was an important matter.

Q. Was it a day after or a day or so afterwards? A. It might have been a day or so.

Q Have you any means of ascertaining the length of time between those two visits? A. Not positively.

Q. You say that you told him that the rental was four or five or six or ten thousand dollars a year? A. I told him that. It was a guess—an approximation.

Q. And he said that was satisfactory? A. He said that was all right.

Q. Anywhere from four thousand to ten thousand dollars a year was all right? A. He said that he must know something because the prospective purchaser was about to go abroad.

Q. When did you first mention Mr. Hutchins' name in connection with this building? A. I think it was after Miss Lenman had seen Mr. Jones, and had returned to my office from the interview with Mr. Jones.

Q. On what date was that? A. That was on Friday morning of this week.

Q. Friday morning, May 5th, according to your best recollection? A. Yes sir.

Redirect Examination.

By Mr. WORTHINGTON:

Q. When you made your return of rent for the month
216 and sent a check, by whom would the check be indorsed when it came back?

Mr. DARLINGTON: I object to that because the checks are the proper evidence of that.

A. They were indorsed—Isobel H. Lenman, Administrator's Account.

Mr. DARLINGTON: I withdraw my objection.

By Mr. WORTHINGTON:

Q. What did you mean when you said that everybody knows who the owners of the Lenman Building are? A. Mr. John T. Lenman was a prominent man here and the building was named after Mr. Lenman. I suppose everybody takes it for granted that Mr. Lenman owns the Lenman Building.

Q. That is what you meant? A. Yes.

Q. You have said to Mr. Darlington that, when you submitted something about this Lenman Building to Miss Lenman, she said: "There is mother." You were about to say something about her action, when you were interrupted. I will ask you how often that happened. A. I was trying to explain to Mr. Darlington that real estate agents would come in and inquire whether the Lenman Building was for sale and they had been to see me so often that I would say no. But when a man of Mr. Jones' standing would come to me and ask me if the Lenman Building was for sale I told him I would re-

port it to Mrs. Lenman. But if a real estate agent would come
217 along and make an inquiry, having been turned down several times by Mrs. Lenman, I would have no hesitation in telling him no, that the Lenman Building was not for sale.

Q. Did you have anything to do with any property in this city in which the title was in Mrs. Lenman. A. I don't know where the title to any of the Lenman property is.

Q. Will you tell me whether, with reference to the Lenman Building or any other building, when you went to see Miss Lenman, you went to see her as the owner or as the agent of her mother? A. As a general thing as the agent of her mother; or they would both confer in regard to matters I would talk to them about.

Recross-examination.

By Mr. DARLINGTON:

Q. Did you ever negotiate the sale of any property for the Lenman estate? A. No, sir, I never did. I have tried to but did not succeed. I did try to sell the Brightwood property; but I could not.

ALBERT T. COUMBE,
(By the Examiner, by Consent.)

The further taking of these depositions was thereupon adjourned subject to further notice.

218 WASHINGTON, D. C., *June* 8, 1907—10 o'clock a. m.

Met pursuant to agreement at the office of Mr. A. S. Worthington, Columbian Law Building, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington.

Present on behalf of the defendants, Mr. Worthington.

Mr. WORTHINGTON: Complying with the request made by counsel for the complainant, at a former session, I produce and hand to counsel a number of tax bills on property standing in the name of John T. Lenman, being tax bills for the year ending June 30, 1892, and 1893.

Also tax bills for the year ending June 30, 1905, on property in the name of John T. Lenman and Isobel H. Lenman.

Mr. DARLINGTON: It has been so long since the request was made that I have forgotten all about it. I am really unable to state at this time whether I desire these to be offered in evidence or not. If counsel will leave them with me I will either return them to him or file them at the next session.

Mr. WORTHINGTON: At the request of counsel for the complainant I also produce a paper which I have received from my client since the last session, being one of the memoranda made by her father, indicating his intentions as to the disposition of his real estate. I have heretofore shown this to Mr. Darlington, and I under-
219 stand that it is agreed that Miss Lenman need not be here to identify the paper.

Mr. DARLINGTON: Let it be offered.

Mr. WORTHINGTON: I offer the paper in evidence on behalf of the defendants.

The above mentioned paper is filed herewith, marked exhibit "Memorandum."

Mr. DARLINGTON: I object to the paper if it is offered as evidence of any intention of the testator in regard to his real estate, on the ground of its inadequacy to furnish proof upon that subject. I also beg to inquire if this is the only one of the several memoranda mentioned in the testimony, which can be produced.

It is stated by counsel for the defendants, and the statement is accepted by counsel for the complainant, as competent evidence, that this is the only one of the papers of this kind referred to by the defendant Isobel H. Lenman in her testimony which she has been able to find.

Mr. WORTHINGTON: At the request of counsel for the complainant I also produce a lease of one of the store rooms in the Lenman Building, being lease dated November 30, 1901, signed by Isobel H. Lenman, and by the United States Fidelity and Guaranty Company.

It is agreed by counsel that this paper may be copied into the record by the examiner and the original returned to counsel for the defendant.

The above mentioned paper is as follows:

220 This agreement, made by and between Isobel H. Lenman, of the city of Washington, District of Columbia, and the United States Fidelity and Guaranty Company, a body corporate, duly created, organized and existing under the laws of the State of Maryland, and as such doing business, among other places, in the District of Columbia, under the provisions of an Act of Congress entitled "An Act Relative to Recognizances, Stipulations, Bonds, and Undertakings and to allow certain Corporations to be accepted as surety thereon," approved August 13th, 1894; Whereby the said Isobel H. Lenman has agreed to let, and does hereby let, to the said United States Fidelity and Guaranty Company, as a tenant, the store-room and cellar, known as No. 1423 New York Avenue, N. W., in said city, for the term of five (5) years, commencing on the first day of December, A. D., 1901, at and for the yearly rental of twelve hundred dollars ($1200) per annum, payable in monthly payments of One Hundred Dollars ($100) per month, in advance, at the office of Albert T. Coumbe, #1425 New York Avenue, N. W., in said city, that is to say, on said first day of each and every month during which the said tenancy may continue, as rent in advance for the next ensuing month.

And the said United States Fidelity and Guaranty Company has agreed to take, and does hereby take and hold the said premises as a tenant, for the term aforesaid, at the said rent, payable as aforesaid, and agrees that it will pay the water rent and gass bills as they become due, and that it will not sub-let or assign the said
221 premises, or carry on any business therein, except that of an office business of the said United States Fidelity and Guar-

anty Company, without the written consent of the Lessor, or use the same for any disorderly or unlawful purpose.

Provided always, that if the said Lessee shall fail to pay the said rent in full in advance as aforesaid although there should have been no legal or formal demand for any rent whatever, or shall neglect to pay the water rent or gas bills at the time and on the day when the same shall fall due and be payable, as hereinbefore mentioned, or shall sub-let or assign the said premises, or carry on any business therein, except as abovestated, without the written consent as aforesaid, or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants, then and in either of said events, this lease, and all things herein contained, shall cease, and determine, and shall operate as a notice to quit, the thirty days' notice to quit being hereby expressly waived. And the Lessor, her heirs and assigns, shall and may proceed to recover the possession of said premises, under and by virtue of a seven days' summons under the provisions of Sections 684 and 685 of the Revised Statutes of the United States, relating to the District of Columbia, to regulate proceedings in cases between landlords and tenants; or by such legal process as may at any time be in operation in like case.

And it is further provided, that if under the provisions of this agreement a seven days' summons shall be served, and a com-
222 promise or settlement shall be made thereupon it shall not constitute a waiver of any covenant herein contained, or of the agreement itself. And the said Lessee hereby agrees to deliver the premises in the same order in which *it was* received, usual wear and tear, fire and storm excepted; and it is hereby provided and agreed that no waiver of any breach of any covenant herein shall be construed to be a waiver of the covenant itself or of any subsequent breach thereof.

And it is further agreed, that in case the said demised premises shall be destroyed or be so injured by the elements, or any other cause as to be untenantable or unfit for occupancy, the tenant shall not be liable or bound to pay the rent to the Lessor, during the period said premises are untenantable, and until the said premises are restored to their previous condition.

In testimony whereof, the said Isobel H. Lenman has hereunto set her hand and seal, and the said United States Fidelity and Guaranty Company has caused its corporate name to be signed by its 2nd Vice President and its corporate seal to be affixed thereto, duly attested by its Secretary, this 30th day of November, A. D. 1901.

ISOBEL H. LENMAN. [SEAL.]

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY.

EDW. J. PENNIMAN, [SEAL.]
2nd V. President."

Attest:

GEO. R. CALLIS, *Secretary.*

223 "Store-room 1423 N. Y. Ave.
From
Isobel H. Lenman
to
The U. S. Fidelity and Guaranty Co.
5 yrs. from Dec. 1-1901."

Mr. WORTHINGTON: In compliance with the request of counsel for the complainant I also produce sixteen of the monthly statements which Mr. Coumbe, a witness in this case, has testified he was accustomed to render, of the rents of the Lenman Building collected by him.

Counsel for the complainant offers the papers in evidence, and they are herewith filed, marked Exhibit —.

Mr. WORTHINGTON: Counsel for the defendants asks counsel for the complainant what is the object in offering these papers in evidence?

Mr. DARLINGTON: One object is to show in whose name this account was carried by Mr. Coumbe, and who was treated as the owner of the building.

Mr. WORTHINGTON: I have no objection to their being offered in evidence for that purpose. Is there any other purpose?

Mr. DARLINGTON: If they show any other fact that is material I shall claim the benefit of it.

Mr. WORTHINGTON: If it is intended to use these for any
224 other purpose than the one specified I object on the ground that they are not competent evidence as to any other fact.

Mr. DARLINGTON: I suppose as these papers come from the possession of Miss Lenman, they were accepted by her as a true account of the revenue derived from the building. If that should be material I shall reserve the right to so argue.

Mr. WORTHINGTON: I specifically object to the papers being introduced in evidence or being used for the purpose indicated on the ground that there is nothing in the issues in this case which justifies the introduction of such evidence; and on the further ground that the complainant has closed his evidence, and that it is not competent now for him to reopen it in this way.

The defendants here rest.

I. O. B. Cross Ex. No. 1.

Return this Bill for Receipt.

Office of the Assessor, D. C.

"Notice.—This bill is for the tax year from July 1, 1906, ending June 30, 1907."

Pay to the Collector of Taxes, D. C.

All of tax payable in May, 1907. One per cent. penalty on the First day of June, 1907, and a like penalty on the first of each succeeding month. One-half, or all, however, may be paid in November, 1906, at option of owner.

1907. Tax Year Ending June 30 1907.

Tax, $1.50 per $100 Assessed Value.

Washington City.

Folio 309.

John T. Lenman, Transferred to ——, ——, to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.
212	S. 95	$3781	$3300	
	" 96	3781	3500	
222	" 2	25168	6500	
	" 3	27309	7500	
	" 4	29359	7000	

	" 5	21720	7000		
	" 6	29244	7000		
	" 7	35256	7000		
283 of	" 1	4380	9000		
"	"18	3504			
288	"30	4332	2800		
	"31	4332	2800		
315	"20	1662	1600		
	"21	1636	1600		
	"22	1636	1600		
	"23	2405	3500		
	"24	2138	2200		
316 of	"22	3072	3000		
	"25	4680	4300		
347 of	11	27885	9000	Continued.	
225½					
366 of	S. 1	$2240	$1500		
374	"31	2664	1800		
380	" N	13949	7000		
429 of	14	8608	4500		
456 "	18	10940	16000		
					390763
				Tax	5861 45

I. O. B. Cross Ex. No. 2.

Return this Bill for Receipt.

Office of the Assessor, D. C.

"Notice.—This bill is for the tax year from July 1, 1906, ending June 30, 1907."

Pay to the Collector of Taxes, D. C.

All of tax payable in May, 1907. One per cent. penalty on the First day of June, 1907, and a like penalty on the first of each succeeding month. One half, or all, however, may be paid in November, 1906, at option of owner.

1907. Tax Year Ending June 30 1907.

Folio 308.

Isobel H. Lenman, Transferred to —— ——, to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.
316	S. 23	$3150	$3200	
	" 26	4334	4000	
337	" 27	1496	3000	
340	" 16	3305	800	
W of 484	of 3	2733	3000	
	S. 8	1144	1000	
529	of 14	1155	1200	
"	15	1155		
634	" 70	1628	3000	
"	71	1569	2800	
672	S. 152	960	300	
	" 153	960		
	" 154	960		
	" 155	960		

	"156	960	400	
	"157	960		
	"158	960		
	"159	960		
	"160	960		
	"161	1016		
672	"162	1016		
	"163	960		
	"164	920		
	"226	9560	1500	
864	" 61	851	2000	
				70832

Tax 1062 48

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EXHIBIT MEMORANDUM.

To I H L the Bal. to Mother.

10 Acres Mount Pleasant	150 000	
2 lots 196 x 199—Strong sub. of lot 8	15 000	
		$165 000
2 Houses--14	30	
1 " L	15	
		210 000
6 Houses New York Ave	300	
		$510 000

A. T. Coumbe, Real Estate and Loans. Estates Placed in my Hands and Property of Non-residents Carefully Managed.

Washington, D. C., *Feb. 20th*, 1893.

Miss Isobel Lenman, Estate of Mr. Jno. T. Lenman, in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
Hay & Coumbe	Room 105.....	25.00	Jan. 1	Feb. 1	25.00		
S. C. Cissel	" 204.....	10.00	Jan. 1	Mch. 1	20.00		
L. C. Tallmadge	" 211.....	12.00	Dec. 1	Feb. 1	25.00		
G. S. Boutwell	" 306.....	22.50	Dec. 1	Jan. 1	22.50		
S. C. Coit	" 304.....	15.00	Jan. 1	Feb. 1	15.00		
W. H. Selden	" 314.....	15.00	Feb. 7	Mch. 7	15.00		
J. McCullis	" 402.....	8.00	Feb. 1	Mch. 1	8.00		
Butts & Phillips .	404–5.....	35.00	Feb. 1	Mch. 1	35.00		
Patrick O'Farrell	208–210–215–.....	137.50	Apr. 1			Pd. up to April 1-93	
Peyton Boyle	" 406–7 412.....	200.00	Mch. 1			Pd. up to Mch. 1-93	
Miss Stewart	" 409-11.....	25.00	Feb. 1	Mch. 1	25.00		
L. S. Wells	" 305.....	10.00	Feb. 1	Mch. 1	10.00		
G. W. Black	" 311.....	12.50	Jan. 1	Feb. 1	12.50		
P. W. Robinson	" 302.....	20.00	Feb. 16	Mch. 16	20.00		

Amn. University	" 414-15.....	20.00	Dec. 15	Jan. 15	20.00	
T. W. Neill	" 310.....	15.00	Jan. 1	Feb. 1	15.00	
J. G. Berret	" 302.....	15.00	Jan. 1	Feb. 1	15.00	
J. N. Webb	" 302.....	10.00	Jan. 1	Feb. 1	10.00	Vacated Jan. 31-93.
G. L. Smith	" 307.....	7.00	Jan. 15	Feb. 15	7.00	
Inaug. Committee	" 102-3-4.....	100.00	Dec. 24	Jan. 24	100.00	
					$400.00	

1893. To repairs, as per accompanying bills:

Jan. 28.	Wages pd. as per voucher for week ending Jan. 28–93, Coal &c		56.00
Feb. 4.	" pd. as per voucher " " " Feb. 4–93 Coal & Gas		69.35
" 11.	" pd. as per voucher " " " Feb. 11–93 Coal		54.00
" 18.	" pd. as per voucher " " " Feb. 18–93		26.70
	To commissions @ 5 per cent. on $400.00		20.00
	Check to bal. acc't		173.95
			$400.00

A. T. COUMBE.

229 E. J. Stellwagen. Thos. M. Gale.

Thos. J. Fisher & Co., Real Estate Brokers, Office 1324 F Street Northwest (Near Ebbitt House).

WASHINGTON, D. C., *May*, 1892.

Est. John T. Lenman.

DEAR SIR: Herewith enclosed please find our check for $403.39, same being in settlement of rent account as per statement below.

	CR.	$	cts.
By rent from Thorowgood for mo. of March		100	84
" Harban & B " " " April		100	00
" Fussell " " " "		115	00
" Lewis " " " "		100	00

To	DR.	$	cts.			
" 3 pr. ct. com. on $415. rent col. Janette R. Lenman		12	45			
" check herewith to balance		403	29			
		415	84		415	84

Very respectfully yours,

FISHER & CO.
E.

WASHINGTON, D. C., *Dec. 4th,* 1903.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bldg.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe	105.....	15.00	Oct. 1	Nov. 1	15.00		
W. H. Selden	315.....	12.50	Oct. 7	Dec. 7	25.00		
Butts & Phillips	304–5.....	30.00	Nov. 1	Dec. 1	30.00		
Pat. O'Farrell	208–10.....	25.00	Dec. 1	Jan. 1	25.00		
T. W. Neill	310.....	12.50	Oct. 1			.....	Not pd.
G. W. Black	409.....	12.50	Sept. 1	Oct. 1	12.50		
Amn. University	415.....	8.00	Nov. 1	Dec. 1	8.00		
Jno. Goode	311.....	12.50	Oct. 1	Dec. 1	25.00	.....	Error report of Oct. 7th — should have been "paid up to Oct. 1—instead of Sept. 1st.
J. H. Parsons	.....	10.00	Nov. 1	Dec. 1	10.00		
Silas Hare	108.....	12.50	Sep. 1	Jan. 1	50.00		
C. W. Hays	104.....	10.00	Dec. 1	Jan. 1	10.00		
J. W. Graham	402.....	8.00	Nov. 1	Dec. 1	8.00		
G. W. Turnburke	204.....	10.00	Dec. 1			.....	Not paid.
E. Catching	305.....	10.00	Nov. 10	Dec. 13	10.00		
C. N. Vance	306.....	25.00	Nov. 10	Dec. 10	25.00	.....	Rent raised to $25.00.
M. G. Miron	106.....	10.00	Nov. 15	Dec. 15	10.00		

For Collection of Rents, &c.—Continued.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
H. R. Burton	110.....	25.00	Nov. 15	Dec. 15	25.00		
L. Powell	.....	15.00	Nov. 15	Dec. 15	15.00		
					$303.50		

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1903.	To repairs, as per accompanying bills:	
Nov. 7.	Wages pd. as per voucher week ending Nov. 7–1903	27.00
" 14.	" " " " " " " " 14–1903	27.00
" 21.	" " " " " " " " 21–1903	27.00
" 28.	" " " " " " " " 28–1903	102.75
	To commissions at 5 per cent. on $303.50	15.17
	Check to bal. acc't	104.58
		$303.50

A. T. COUMBE.

WASHINGTON, D. C., *Dec. 7th*, 1904.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Stores.

	Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
1427	N. Y. Ave	125.00	Oct. 21	Dec. 1	169.33	80.67	Jacob Fussell Co.
1423	" " "	100.00	Nov. 1	Dec. 1	100.00		U. S. Fid. & Guar. Co.
1421	" " "	100.00	Nov. 1	Dec. 1	125.00		J. R. Peak, 5th payment on window.
1419	" " "	100.00	Nov. 1	Dec. 1	100.00		G. W. Mobray.
					$494.33		

1904. To repairs, as per accompanying bills:

Dec. 3. Magnabestos Covg. for pipes in Lenman Bldg. 107.02
To commissions at 3 per cent. on $494.33 . . . . . 14.82
Check to bal. acc't 372.49

$494.33

A. T. COUMBE.

233 A. T. Coumbe, Real Estate & Loans. Estates Placed in My Hands and Property of Non-residents Carefully Managed.

WASHINGTON, D. C., *Dec. 9th,* 1904.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bld'g.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe	105.....	15.00	Oct. 1	Nov. 1	15.00		
W. H. Selden	315.....	12.50	Oct. 7			.....	Not pd.
Butts & Philips	404–5.....	30.00	Nov. 1	Dec. 1	30.00		
Mrs. O'Farrell	308–10.....	25.00	Nov. 1	Dec. 1	25.00		
T. W. Neill	310.....	12.50	Jan. 1			.....	Pd. up to Jan. 1–'05.
G. W. Black	409.....	12.50	June 1				
Jno. Goode	311.....	12.50	July 1	Oct. 1	37.50		
Silas Hare	108.....	12.50	Jan. 1			.....	Pd. up to Jan. 1–'05.
C. W. Hays	104.....	10.00	Dec. 1	Jan. 1	10.00		
J. W. Graham	307.....	4.00	Dec. 1	Jan. 1	4.00		
G. W. Turnburk	304.....	10.00	Nov. 1	Dec. 1	10.00		
E. Catching	305.....	10.00	Nov. 13	Dec. 13	10.00		
C. E. Lyman	110.....	25.00	Dec. 1	Jan. 1	25.00		
J. W. Kinsley	106.....	10.00	Nov. 23	Dec. 23	10.00		
E. von Listen	205.....	22.50	Oct. 22	Nov. 22	22.50		
J. L. Parsons	209.....	10.00	Dec. 1	Jan. 1	10.00		

Y. M. C. A.	107–9–11–211.....	70.00	Nov. 15	Dec. 15	70.00
Lucien Powell	401.....	15.00	Nov. 1	Dec. 1	15.00
Augusta DeForest	315.....	10.00	Nov. 10	Dec. 10	10.00
					$304.00

1904. To repairs, as per accompanying bills:

Nov. 5.	Wages pd. as per vouchers weeks ending Nov. 5 1904		27.00
" 12.	" " " " " " " " 12 1904		27.00
" 19.	" " " " " " " " 19 1904		27.00
" 26.	" " " " " " " " 26 1904		128.25
	To commissions at 5 per cent. on $304.00		15.20
	Check to bal. acc't		79.55
			$304.00

A. T. COUMBE.

234 A. T. Coumbe, Real Estate & Loans. Estates Placed in My Hands and Property of Non-residents Carefully Managed.

WASHINGTON, D. C., *Jan. 10th*, 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bldg.

Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe 105.....	15.00	Nov. 1	Dec. 1	15.00		
W. H. Selden 315.....	12.50	Oct. 7				Not pd.
Butts & Phillips 404–5.....	30.00	Dec. 1	Jan. 1	30.00		
Mrs. O'Farrell 308–10.....	25.00	Dec. 1	Jan. 1	25.00		
T. W. Neill 310.....	12.50	Jan. 1	Apr. 1	37.50		
G. W. Black 409.....	12.50	Jun- 1	Aug. 1	25.00		
Jno. Goode 311.....	12.50	Oct. 1	Dec. 1	25.00		
Silas Hare 108.....	12.50	Jan. 1				Pd. up to Jan. 1, 1905.
C. W. Hays 104.....	10.00	Jan. 1	Feb. 1	10.00		
J. W. Graham 307.....	4.00	Jan. 1	Feb. 1	4.00		
G. W. Turnburk	10.00	Dec. 1	Jan. 1	10.00		
E. Catching 305.....	10.00	Dec. 13	Jan. 13	10.00		
C. E. Lyman 110.....	25.00	Jan. 1	Feb. 1	25.00		
J. W. Kinsley 106.....	10.00	Dec. 23				Vacated.
E. von Listner 205.....	22.50	Nov. 22	Dec. 22	22.50		
J. L. Parsons 309.....	10.00	Jan. 1	Feb. 1	10.00		
Y. M. C. A. 107–9–11–211.....	70.00	Dec. 15				Not paid.

Lucien Powell	401..... 15.00	Dec. 1	Jan. 1	15.00
Augusta De Forest	315..... 10.00	Dec. 10	Jan. 10	10.00
M. B. Casey	311..... 10.00	Jan. 1	Feb. 1	10.00
P. D. Morrison	106..... 10.00	Jan. 1	Feb. 1	10.00
				$294.00

1904. To repairs, as per accompanying bills:

Dec. 3.	Wages pd. as per vouchers, week ending Dec. 3, 1904	27.00
" 10.	" " " " " " " " 10, 1904	27.00
" 17.	" " " " " " " " 17, 1904	27.00
" 24.	" " " " " " " " 24, 1904	27.00
" 31.	" " " " " " " " 31, 1904	138.75
	To commissions at 5 per cent. on $294.00	14.00
	Check to bal. acc't	32.55
		$294.00

A. T. COUMBE.

235 A. T. Coumbe, Real Estate & Loans. Estates Placed in My Hands and Property of Non-residents Carefully Managed.

WASHINGTON, D. C., *Jan. 4th*, 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Stores. Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
1427 N. Y. Ave	125.00	Dec. 1	Jan. 1	125.00	80.67	Jacob Fussell Co.
1423 " " "	100.00	Dec. 1	Jan. 1	100.00		U. S. Fid. & Guar. Co.
1421 " " "	100.00	Dec. 1	Jan. 1	125.00		J. R. Peak 6th payment on window.
1419 " " "	100.00	Dec. 1	Jan. 1	100.00		G. W. Mobray.
				$450.00		

To repairs, as per accompanying bills: 13.50
To commissions at 3 per cent. on $450.00 436.50
Check to bal. acc't $450.00

A. T. COUMBE.

WASHINGTON, D. C., *Feb. 7th*, 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bld'g.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe	105.....	15.00	Dec. 1	Jan. 1	15.00		
W. H. Selden	315.....	12.50	Oct. 7	Feb. 7	50.00		
Butts & Phillips	404–405.....	30.00	Jan. 1	Feb. 1	30.00		
Mrs. O'Farrell	308–310.....	25.00	Jan. 1	Feb. 1	25.00		
T. W. Neill	310.....	12.50	Apr. 1				Pd. up to Apr. 1, 1905
G. W. Black	409.....	12.50	Aug. 1	Oct. 1	25.00		
Jno. Goode	311.....	12.50	Dec. 1	Jan. 1	12.50		
Silas Hare	108.....	12.50	Jan. 1				Pd. up to Jan. 1, 1905
C. W. Hays	104.....	10.00	Feb. 1				Not pd.
J. W. Graham	307.....	4.00	Feb. 1	Mch. 1	4.00		
G. W. Turnburk	.....	10.00	Jan. 1	Feb. 1	10.00		
E. Catching	305.....	10.00	Jan. 13	Feb. 13	10.00		
E. von Listner	205.....	22.50	Dec. 22	Jan. 22	22.50		
J. L. Parsons	309.....	10.00	Feb. 1				Not pd.
Y. M. C. A.	107–9–11–211.....	70.00	Dec. 15	Jan. 15	70.00		
L. Powell	401.....	15.00	Jan. 1				" "
Agusta DeForest	3.....	10.00	Jan. 10	Feb. 10	10.00		
H. B. Casey	311.....	10.00	Feb. 1	Mch. 1	10.00		

For Collection of Rents, &c.—Continued.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
P. D. Morrison	106.....	10.00	Feb. 1	Mch. 1	10.00		
C. E. Lyman	110.....	25.00	Feb. 1	Mch. 1	25.00		
					$329.00		

1905.	To repairs, as per accompanying bills:	
Jan. 7.	Wages pd. as per vouchers, week ending Jan. 7, 1905	27.00
" 14.	" " " " " " " " 14, 1905	27.00
" 21.	" " " " " " " " 21, 1905	27.00
" 28.	" " " " " " " " 28, 1905	171.02
	To commissions at 5 per cent. on $329.00	16.45
	Check to bal. acc't	60.53
		$329.00

A. T. COUMBE.

237 A. T. Coumbe, Real Estate & Loans. Estates Placed in My Hands and Property of Non-residents Carefully Managed.

WASHINGTON, D. C., *Feb. 7th,* 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Stores.

Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
1427 N. Y. Ave	125.00	Jan. 1	.....	.....	80.67.	Jacob Fussell Co. not pd.
1423 " " "	100.00	Jan. 1	Feb. 1	100.00	.....	U. S. Fid. & Guar. Co.
1421 " " "	100.00	Jan. 1	Feb. 1	125.00	.....	J. R. Peak 7th payment on window.
1419 " " "	100.00	Jan. 1	Mch. 1	200.00	.....	Heiberger & Vandorm.
				$425.00		

To commissions at 3 per cent. on $425.00	12.75
Check to bal. acc't	$412.25
	$425.00

A. T. COUMBE.

WASHINGTON, D. C., *M'ch 7th*, 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bldg.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe	105.....	15.00	Jan. 1	Feb. 1	15.00		
W. H. Selden	315.....	12.50	Feb. 7				
Butts & Phillips	404–5.....	30.00	Feb. 1	M'ch 1	30.00		
Mrs. O'Farrell	308–310.....	25.00	Feb. 1	M'ch 1	25.00		
T. W. Neill	310.....	12.50	Apr. 1				Pd. up to Apr. 1, 1905
G. W. Black	409.....	12.50	Oct. 1				
Jno. Goode	311.....	12.50	Jan. 1				
Silas Hare	108.....	12.50	Jan. 1	May 1	50.00		
C. W. Hays	104.....	10.00	Feb. 1	Apr. 1	20.00		
J. W. Graham	307.....	4.00	M'ch 1	Apr. 1	9.00		
G. W. Turnburk	.....	10.00	Feb. 1	M'ch 1	10.00		
E. Catching	308.....	10.00	Feb. 13	M'ch 13	10.00		
E. von Listner	205.....	22.50	Jan. 22	Feb. 22	22.50		
J. L. Parsons	309.....	10.00	Feb. 1	M'ch 1	10.00		
Y. M. C. A.	107–9–11.....	70.00	Jan. 15	Feb. 15	70.00		
L. Powell	401.....	15.00	Jan. 1				Not pd.
Augusta de Forest	.....	10.00	Feb. 10	M'ch 10	10.00		
H. B. Casey	311.....	10.00	M'ch 1	Apr. 1	10.00		
P. D. Morrison	106.....	10.00	M'ch 1	Apr. 1	10.00		

ISOBEL H. LENMAN VS. THOMAS R. JONES.

C. E. Lyman	110.....	25.00	M'ch 1	Apr. 1	25.00
P. Potter	402.....	8.00	Feb. 13	M'ch 13	8.00
W. H. Hill, Gov. Board	103.....	50.00	Jan. 25	Feb. 25	50.00
M'ch 4th 3 rooms	.....	15.00	.....	.....	15.00
					$399.50

1905. To repairs, as per accompanying bills:

Feb. 4.	Wages pd. as per vouchers, week ending Feb. 4, 1905	133.68
" 11.	" " " " " " " " 11, 1905	27.00
" 18.	" " " " " " " " 18, 1905	27.00
" 25.	" " " " " " " " 25, 1905	27.00
M'ch 4.	" " " " " " " " M'ch 4, 1905	27.00
	To commissions at 5 per cent. on $399.50	19.97
	Check to bal. acc't	137.85
		$399.50

A. T. COUMBE.

239 A. T. Coumbe, Real Estate & Loans. Estates Placed in My Hands and Property of Non-residents Carefully Managed.

WASHINGTON, D. C., *Mch. 3d,* 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Stores.

Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
1427 N. Y. Ave	125.00	Jan. 1	Feb. 1	125.00	80.67	Frank Fussell.
1423 " " "	100.00	Feb. 1	Mch. 1	100.00		U. S. Fid. & Guar. Co.
1421 " " "	100.00	Jan. 1	Mch. 1	125.00		J. R. Peak, 8th payment on window.
1419 " " "	100.00	Mch. 1	Apr. 1	100.00		Heiberger & Vandorn.
				$450.00		

To repairs, as per accompanying bills:

New spout show window 1419 N. Y. Ave	3.50
To Commissions at 3 per cent. on $450.00	13.50
Check to bal. acc't	433.00
	$450.00

WASHINGTON, D. C., *Apr. 4th*, 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Stores, Lenman Building.

Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
1427 N. Y. Ave	125.00	Feb. 1	Apr. 1	330.00	#67¢	M. T. Fussell, # cancelled.
1423 " " "	100.00	Mch. 1	Apr. 1	100.00		U. S. Fid. & Guar. Co.
1421 " " "	100.00	Mch. 1	Apr. 1	125.00		J. R. Peak, 9th payment window.
1419 " " "	100.00	Apr. 1	May 1	100.00		Heiberger & Vandorm.
				$655.00		

To commissions at 3 per cent. on $655.00	19.65
Check to bal. acc't	635.35
	$655.00

A. T. COUMBE.

WASHINGTON, *Apr. 4th*, 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bld'g.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe	105.....	15.00	Feb. 1	Mch. 1	15.00		
W. H. Selden	315.....	12.50	Feb. 7	Apr. 7	25.00		
Butts & Phillips	404–5.....	30.00	Mch. 1	Apr. 1	30.00		
Mrs. O'Farrell	308–310.....	25.00	Mch. 1	Apr. 1	25.00		
T. W. Neill	310.....	12.50	Apr. 1				Pd. up to Apr. 1–'05.
G. W. Black	409.....	12.50	Oct. 1	Jan. 1	37.50		
Jno. Goode	311.....	12.50	Jan. 1				
Silas Hare	108.....	12.50	May 1				Pd. up to May 1–'05.
C. W. Hays	108.....	10.00	Apr. 1	May 1	10.00		
J. W. Graham	307.....	4.00	Apr. 1	May 1	4.00		
G. W. Turnburg	204.....	10.00	Mch. 1	Apr. 1	10.00		Vacated.
E. Catching	308.....	10.00	Mch. 13	Apr. 13	10.00		
E. von Listner	205.....	22.50	Feb. 22	Mch. 22	22.50		
J. L. Parsons	309.....	10.00	Mch. 1	Apr. 1	10.00		
Y. M. C. A.	107–9–211.....	70.00	Feb. 15	Apr. 15	140.00		
L. Powell	401.....	15.00	Jan. 1				Not pd.
Augusta de Forest	.....	10.00	Mch. 10	Apr. 10	10.00		
H. B. Casey	311.....	10.00	Apr. 1				Not pd.

F. D. Morrison	106.....	10.00	Apr. 1	May 1	10.00	
C. E. Lyman	110.....	25.00	Apr. 1	May 1	25.00	
P. Potter	402.....	8.00	Mch. 13	Apr. 13	8.00	
H. H. Hills, Gov. Board, &c.....		50.00	Feb. 25	Mch. 25	50.00	
M. Stabler	407.....	5.00	Mch. 6	Apr. 6	5.00	
C. H. Hood, Steam Reg.		10.00	Sold		10.00	.....Old regulator sold to Mr. Hood.

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1905. To repairs, as per accompanying bills:

Mch. 11.	Wages pd. as per vouchers, week ending Mch. 11–'05.....	27.00
" 18.	" " " " " " " " 18–'05.....	27.00
" 25.	" " " " " " " " 25–'05.....	27.00
Apr. 1.	" " " " " " " " 1–'05.....	132.30
	To commissions at 5 per cent. on $457.00.....	22.85
	Check to bal. acc't.....	220.85
		$457.00

A. T. COUMBE.

243 A. T. Coumbe, Real Estate & Loans. Estates Placed in My Hands and Property of Non-residents Carefully Managed.

WASHINGTON, D. C., *May 5th*, 1905.

Miss Isobel H. Lenman, in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Stores, Lenman Bld'g.

Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
1427 N. Y. Ave	125.00	Apr. 1	May 1	125.00		M. T. Fussell.
1423 " " "	100.00	Apr. 1	May 1	100.00		U. S. Fid. & Guar. Co.
1421 " " "	100.00	Apr. 1	May 1	125.00		J. R. Peak 10th payment window.
1419 " " "	100.00	May 1	June 1	100.00		Heiberger & Vandorm.
				$450.00		

To repairs as per accompanying bills:

Repair roof of show window & downspout 1417 N. Y. Ave	15.00
To commissions at 3 per cent. on $450.00	13.50
Check to bal. acc't	421.50
	$450.00

A. T. COUMBE.

A. T. Coumbe, Real Estate & Loans. Estates Placed in My Hands and Property of Non-residents Carefully Managed.

WASHINGTON, D. C., *May 8th*, 1905.

Miss Isobel H. Lenman, in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bldg.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe	105.....	15.00	M'ch 1	Apr. 1	15.00		
W. H. Selden	315.....	12.50	Apr. 7				Not pd.
Butts & Phillips	404–5.....	30.00	Apr. 1	May 1	30.00		
Mrs. O'Farrell	308–310.....	25.00	Apr. 1	May 1	25.00		
T. W. Neill	310.....	12.50	Apr. 1	July 1	37.50		
G. W. Black	409.....	12.50	Jan. 1				Not pd.
J. Goode	311.....	12.50	Jan. 1	M'ch 1	25.00		
Silas Hare	108.....	12.50	May 1	Jan. 1 (1906)	90.00		
C. W. Hays	104.....	10.00	May 1				Not pd.
J. W. Graham	307.....	4.00	May 1				
E. Catching	308.....	10.00	Apr. 13	May 13	10.00		
E. von Listner	205.....	22.50	M'ch 22	Apr. 22	22.50		
J. L. Parsons	309.....	10.00	Apr. 1	May 1	10.00		
L. Powell	401.....	15.00	Jan. 1				Not pd.
Augusta de Forrest	.....	10.00	Apr. 10				Vacated.
H. B. Casey	311.....	10.00	Apr. 1	May 1	10.00		

ISOBEL H. LENMAN VS. THOMAS R. JONES.

For Collection of Rents, &c.—Continued.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
P. D. Morrison	106.....	10.00	May 1	June 1	10.00		
C. E. Lyman	110.....	25.00	May 1	June 1	25.00		
P. Potter	407.....	8.00	Apr. 13	May 13	8.00		
H. H. Hills G. Board &c.	.....	50.00	M'ch 25	Apr. 25	50.00		
M. Stabler	407.....	5.00	Apr. 6	May 6	5.00		
					$373.00		

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1905. To repairs, as per accompanying bills:

Apr. 8.	Wages pd. as per vouchers, week ending Apr. 8–1905	.....	27.00
" 15.	" " " " " " " " 15–1905	.....	27.00
" 22.	" " " " " " " " 22–1905	.....	27.00
" 29.	" " " " " " " " 29–1905	.....	27.00
May 6.	" " " " " " " May 6–1905	.....	83.85
	To commissions at 5 per cent. on $373.00	.....	18.65
	Check to bal. acc't	.....	162.50
			$373.00

A. T. COUMBE.

WASHINGTON, D. C., *July 5th*, 1905.

Miss Isobel H. Lenman, in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Stores, Lenman Bld'g.

Property.	Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
1427 N. Y. Ave	125.00	June 1	July 1	125.00		M. T. Fussell.
1423 " " "	100.00	June 1	July 1	100.00		U. S. Fid. & Guar. Co.
1421 " " "	100.00	June 1	July 1	125.00		J. R. Peak 12 payment window.
1419 " " "	100.00	July 1	Aug. 1	100.00		Heiberger & Vandorm.
				$450.00		

To commissions at 3 per cent. on $450.00	13.50
Check to bal. acc't	436.50
	$450.00

A. T. COUMBE.

WASHINGTON, D. C., *July 6th*, 1905.

Miss Isobel H. Lenman in Account with A. T. Coumbe, 1425 New York Avenue.

For Collection of Rents, &c.

Offices, Lenman Bld'g.

Property.		Monthly rent.	From	To	Amount collected.	Arrears.	Remarks.
A. T. Coumbe,	105.....	15.00	May 1	June 1	15.00		
W. H. Selden	315.....	12.50	Apr. 7	June 7	25.00		
Butts & Phillips	404–5.....	30.00	Jun- 1	July 1	30.00		
Mrs. O'Farrell	308–10.....	25.00	Jun- 1	July 1	25.00		
T. W. Neill	310.....	12.50	Jul- 1				Pd. up to July 1–1905
G. W. Black	409.....	12.50	Apr. 1	July 1	37.50		
J. Goode	311.....	12.50	Mch. 1				
Silas Hare	108.....	12.50	Jan. 1				Pd. up to Jan. 1–1906.
C. W. Hays	104.....	10.00	May 1	July 1	20.00		
J. W. Graham	307.....	5.00	Jun- 1	July 1	5.00		
E. von Listner	205.....	22.50	May 22	June 22	22.50		
J. L. Parsons	309.....	10.00	Jun- 1	July 1	10.00		
L. Powell	401.....	15.00	Jan. 1				Not pd.
H. B. Casey	311.....	10.00	Jun- 1	July 1	10.00		
P. D. Morrison	106.....	10.00	Jun- 15				Vacated June 15, 1905
C. E. Lyman	110.....	25.00	July 1	Aug. 1	25.00		
Milton Stabler	407.....	5.00	Jun- 6				Vacated June 6, 1905.
					$225.00		

1905. To repairs, as per accompanying bills:

June 10.	Wages pd. as per vouchers, week ending June	10, 1905	75.92
" 17.	" " " " " " " "	17, 1905	27.00
" 24.	" " " " " " " "	24, 1905	28.00
July 1.	" " " " " " " July	1, 1905	27.00
	To commissions at 5 per cent. on $225.00		11.25
	Check to bal. acc't		55.83
			$225.00

A. T. COUMBE.

249 *Testimony in Rebuttal.*

Filed November 7, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 25493.

JONES
vs.
LENMAN.

WASHINGTON, D. C., SATURDAY, *November* 2, 1907.

Met pursuant to adjournment at the residence of J. J. Darlington, Esq., 1610 20th Street N. W., at 8:30 p. m.

Present on behalf of the complainants, Mr. Darlington and Mr. Douglas.

Present on behalf of the defendants, Mr. Worthington and Mr. Frailey.

THOMAS R. JONES, the complainant, being first duly sworn is examined.

By Mr. DARLINGTON:

Q. Mr. Jones, you are the complainant in this case? A. I am.

Q. Do you recall an interview between Miss Lenman and yourself, at your office, as President of the National Safe Deposit, Savings and Trust Company, a few days after your purchase of Miss Wilhoit's interest in this contract of sale? A. I do.

250 Mr. WORTHINGTON: Before that question is answered and once for all, as to anything Mr. Jones is inquired about concerning that, I desire to object to it on the ground that it is one of the allegations in his bill, and if he desired to offer evidence in regard to it he should have testified in reference to it in his case in chief, and it is not competent in rebuttal.

Mr. DARLINGTON: To which I reply that if the defendant relied on the statements in the bill in regard to that, she should have contented herself with relying upon it, and not have testified in regard to it in this case.

Q. Please state whether at that interview you said to Miss Lenman, "I am the purchaser of the Lenman Building. You know the Company could not hold it unless we used it, so I am buying it for the Company."

Mr. WORTHINGTON: I further object to that as leading.

A. I made the statement contained in the first part of that sentence, "I am the purchaser of the building," but I did not make the balance of the remark.

Q. What if anything was said at that interview, by Miss Lenman to you, to the effect that this was a great surprise to her mother and

herself, and that they were very much distressed about it? A. She said that she was surprised that I had not come to them directly, but she said nothing about distress.

Q. What if anything did she say to you about the employees and tenants of the Lenman Building, and the length of time that they had been there? A. She spoke of the tenants, but not of the
251 employees, and she desired to protect them so far as possible before she completed the sale.

Q. What if anything did you say to her about the tenants and the employees, in that connection? A. I said to her that she could not well sell to anybody else who would be less likely to disturb them, because the purpose for which I bought would not necessitate the use of the building within the next two or three years perhaps.

Q. And what if anything, was said by you in regard to the employees? A. Nothing.

Q. What about the retention of the engineer and Mr. Coumbe? A. Nothing.

Q. What, if anything, was said by you to her on that occasion about having your plans ready for changes in the building or anything of that nature? A. Nothing was said about plans further than I proposed possibly to put in a new elevator and do some painting and cleaning, so that the unoccupied rooms might be rented.

Q. What if anything was said about a new entrance? A. Nothing.

Q. What plans had you at that interview in the shape of papers on your table or otherwise? A. No plans were ever made. I stated verbally what I proposed doing.

Q. What, if anything, was there in the nature of architect's drawings or plans on the table at that time for this proposed
252 change? A. None were ever made, and consequently there were none there.

Q. What, if anything, did you say to Miss Lenman about her going to Mr. Edmonston and finding him all right, a man whom she could trust? A. I said to her that Mr. Edmonston's Company was examining the title, and would prepare the papers, and when she decided to close the transaction it could be closed there, and I also understood that he was her adviser and friend, and consequently presumed that would be an entirely agreeable way to her of closing the transaction.

Mr. WORTHINGTON: I object to any presumption, if not communicated to Miss Lenman.

A. That was communicated to her. That was a part of the statement, that I said to her, that I presumed it would be satisfactory to her.

By Mr. DARLINGTON:

Q. What, if anything, did you say to her about finding Mr. Edmonston all right, and that she could trust him? A. Nothing. I took that for granted.

Q. What, if anything, was said by Miss Lenman on that occasion

about something being a little crooked about the transaction? A. Nothing.

Q. I read from the deposition of Miss Lenman at page 27 and ask you to state how far it is correct:

"There must be something a little bit crooked about this transaction. I understood the payment was to be $50,000 in cash
253 and the balance at 4½ per cent. for three years."

A. May I state just what was said on that subject?

Q. Please state first whether this was said or not, and then you can state what was said. A. That was not said as stated there.

Q. You may go on. A. I asked Miss Lenman what her terms were as she understood them, and she said $50,000 cash, the balance at 4½ per cent. on or before three years.

Q. What if anything was said about crookedness, or anything of that character? A. Nothing.

Q. Do you remember the occasion of the tendering to Miss Lenman of the cash payment and the purchase money notes? A. I do.

Q. What, if anything, can you tell us about the presence of Mr. Hoover there on that occasion? A. He was there by your request.

Q. Did you hear the request? A. I heard you request him to go as a witness. All the rest of the parties that were expected to be present were interested, and you wanted a disinterested witness.

Q. You say you referred Miss Lenman to Mr. Edmonston, stating that he was to examine the title for you. Who arranged with Mr. Edmonston to make that examination? A. I did.

Q. In what way? A. By going to his office.

Q. Personally? A. Personally, within an hour after I
254 signed the contract.

Q. Mr. Edmonston states that he thinks the order came through Mr. Hoover. A. He is mistaken.

Q. Where was Mr. Hoover on that date? A. He was out of the city at Great Falls, attending an excursion with his family.

Q. Do you recall any negotiations between yourself and Mr. Coumbe in regard to the purchase of the Lenman property or any part of it? A. To buy a part of it.

Q. Please state the circumstances. A. Before we entered upon the improvements of the bank, which was about four years ago, on account of the narrowness of the north end of our land, we were anxious to get a little more room for our Safety Deposit Vaults.

Q. Is the north end the rear or front of the building? A. The rear. We were about to move our vaults, and we did move them sixty feet north. Our north line being so narrow, only 12 feet, we were anxious to get a part of the lot just east of our north end.

Q. How large a part? A. About 20 by 25 feet, or such portion as was north of the building occupied by Mr. Fussel. The part of the building occupied by Mr. Fussel does not extend to the north line of the lot. There is a space there of about 20 to 25 feet that is occupied by a temporary one story building used as a kitchen by Mr. Fussel; and our object was to endeavor to negotiate for that special
255 space, and believing that we might get it at a lower price our intention was not to build more than one story, so we would

not block the lights of the main building, and I went to see Mr. Coumbes to ascertain whether it was possible to purchase that.

Q. What negotiation if any did you make with him about the purchase of the whole building? A. None. It was never in our minds, or my mind.

Q. What overture if any, did you make to him for the purchase of any more than the 20 or 25 feet you have spoken of in the rear? A. None.

Q. What reply did Mr. Coumbe bring you? A. That Miss Lenman was not disposed to sell.

Q. What if anything was said to you about Mrs. Lenman? A. Nothing.

Q. When did you first learn that there was a Mrs. Lenman? A. When I applied to Mr. Edmonston as President of that Company to rush the title. I stated to him that as we only had five days in which to close our contract, if we did not get the title and papers ready in that time, it might be possible that Early and Lampton might be disposed to sell to somebody else, and he replied that if that was the undertaking it could be blocked by the widow's dower.

Q. How is that? A. That if Early and Lampton undertook in any way to dispose of the property without coming to us, such effort could be blocked by the widow's dower.

256 Q. Did he explain what he meant? A. That Mrs. Lenman was living and she was entitled to dower, and that was my first knowledge that there was a widow, or that she had anything to do with the property. Q. And this occurred when? A. When I went to him to ask him to rush the title through the office.

Q. Going back to your interview with Miss Lenman on the occasion referred to in the testimony, I desire to read from her deposition at page 27, as follows, and ask you what the fact is:

"He," referring to you, said "you just take your papers down to Mr. Edmunston; we do not trust Lampton: we want to get this matter out of his hands just as soon as we can."

A. That remark was not made in that shape. The remark was that we had but five days to close the contract, and Early and Lampton might be disposed to contract elsewhere unless we completed it within that time, and therefore I was anxious to get it out as quickly as possible.

Cross-examination.

By Mr. WORTHINGTON:

Q. In your bill in this case, you say "Complainant, whose purchase had been made for a special purpose, in which he was and is greatly interested." What did you mean by that?

257 Mr. DARLINGTON: I object that that is not responsive to the direct examination, and I give notice that I shall claim that counsel is making the witness his own. A. That in case that building should pass into any other hands that were not friendly to our company, we might be prevented from getting a part of it to

add to our rear line, and thus straighten out to a certain extent our line and get more space at that point.

Q. Was any action taken by your Board as a board in reference to that matter? A. None.

Q. You have been asked about the tender that you made. That was $50,000? A. It was.

Q. Where did that come from? A. From the bank—money that was borrowed by me.

Q. Did you have any communication with any of the other officers of the bank in reference to this protecting the bank in this way before you made your contract of purchase with Early and Lampton? A. I did not.

Q. When you borrowed this $50,000 from the bank did you give any security? A. I proposed a trust on the property and had the papers prepared, and it would have been executed had not the question arisen as to the delivery of the property, which was not completed.

Q. Who had the $50,000 in hand on the day it was tendered? A. I had.

258 Q. In what way was it drawn from the bank? A. Held on memorandum pending the conclusion of the loan, not an unusual performance.

Q. Do you mean not an unusual performance for your bank, or are you speaking of banks generally? A. Oftentimes pending the completion of a loan, items are held on memorandum until the papers are finally completed.

Q. Did you at any time after you had this conversation with Miss Lenman, that Mr. Darlington has inquired about, make any memorandum in reference to it? A. I did.

Q. When? A. On the 26th of May.

Q. That was how long after the conversation? A. This conversation was about the 4th or 5th. It was about twenty days after.

Redirect Examination.

By Mr. DARLINGTON:

Q. At whose instance or request did you make that memorandum? A. Mr. Darlington's.

Q. You have been asked whether you conferred with any member of your Board before closing your contract?

Mr. WORTHINGTON: "Officers of the Company" was the question.

By Mr. DARLINGTON:

259 Q. Did you confer with any officers of the Company before your transaction with Mr. Lampton? A. I did not.

Q. What knowledge, if any, had any officer or member of the board, as far as you know, of the transaction, until after you had made the contract? A. None, no member of the board.

Q. What discussion had ever taken place between you and any member of the board of any of the officers in regard to the purchase

of the Lenman Building? A. Do you mean before the purchase was made?

Q. That is what I mean, before the purchase was made? A. None.

Q. What agreement or understanding, down to the present time known to you, has ever been made with regard to the sale of the Lenman Building to the Trust Company, or its acquisition of it? A. None.

Q. What purpose if any exists or has ever existed on the part of the Trust Company to acquire the Lenman Building? A. None.

Recross-examination.

By Mr. WORTHINGTON:

Q. One question I should have asked on cross examination, that was about Mr. Hoover. What position did Mr. Hoover hold in the bank at the time of this tender? A. Second Vice President.

Q. Has he held that office ever since? A. Yes, sir.

260 Q. He is trust officer too? A. Yes, sir.

Q. And was then? A. Yes, sir.

Q. And he is here now? A. Yes, sir.

Q. Has been here right along? A. Yes, sir.

Mr. DARLINGTON: We will produce him if counsel desire, for any purpose, and we will produce any other officers or directors or employees of the company on notice.

The WITNESS: May I state how I first came to know Miss Lenman.

Mr. DARLINGTON: I have no objection, and there seems to be no objection.

A. A lady came into the office, a lady whom I did not know, on the 4th or 5th of May, and said smilingly, "I am Miss Lenman, your next door neighbor, the owner of the adjoining property."

Mr. WORTHINGTON: If this is to be an effort on the part of the witness to substantiate the statements he has made heretofore, I object on the ground that he should have done that as a part of his case in chief.

By Mr. DARLINGTON:

Q. Was that your first introduction to Miss Lenman? A. My first introduction to Miss Lenman.

Mr. DARLINGTON: That is all. Complainant rests.

Mr. DOUGLAS: I have no questions.

Mr. WORTHINGTON: I want to read this over after it is written out. I may possibly have some sur-rebuttal.

THOMAS R. JONES.

261 *Decree.*

Filed June 15, 1908.

In the Supeme Court of the District of Columbia.

No. 25493. Equity.

THOMAS R. JONES, Complainant,
vs.
ISOBEL H. LENMAN and JENNETTE R. LENMAN, Defendants.

This cause coming on to be heard upon the pleadings and the evidence, and having been argued by the solicitors for the respective parties, and duly considered, and it appearing to the court that the complainant, Thomas R. Jones, is entitled to a decree against the defendant Isobel H. Lenman, but not against the defendant Jennette R. Lenman, for the specific performance of the contract of May 2nd, 1905, described in the bill, and that the time for the payment of the deferred purchase money as provided by the said contract has now expired, it is thereupon by the court, this 15th day of June, A. D. 1908, adjudged, ordered and decreed that, upon payment or tender by the complainant, Thomas R. Jones, to the defendant Isobel H. Lenman or to her solicitor of record, of two hundred thousand ($200,000.00) dollars within twenty-eight (28) days from the date hereof, the said defendant Isobel H. Lenman be, and she hereby is, required and decreed to execute and deliver to the said Thomas R. Jones a deed of conveyance, with special warranty, conveying to
262 him, in fee simple, lots four (4), five (5), six (6) and seven (7), in square numbered two hundred and twenty-two (222), in the City of Washington, in the District of Columbia, known as the Lenman Building, all taxes to be paid and rents adjusted to the date of the delivery of said conveyance, as provided by said contract, and, further, that the complainant, Thomas R. Jones, recover against the defendant Isobel H. Lenman his costs of this suit, to be taxed by the Clerk, and that he have execution therefor as at law. It is further adjudged, ordered, and decreed that the bill be, and it hereby is, dismissed as to the defendant Jennette R. Lenman.

ASHLEY M. GOULD, *Justice.*

From so much of the foregoing decree as grants relief against the defendant Isobel H. Lenman she prays an appeal to the Court of Appeals of the District of Columbia which is allowed. The penalty of her appeal bond if for costs only is fixed at one hundred dollars and if to operate as a supersedeas at Fifty thousand dollars.

ASHLEY M. GOULD, *Justice.*

Memorandum.

June 18, 1908.—Appeal bond (supersedeas) filed.

263 *Directions to Clerk for Preparation of Transcript of Record.*

Filed June 23, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 25493.

THOMAS R. JONES
vs.
ISOBEL H. LENMAN ET AL.

The clerk of the court will please include in the transcript of record on appeal to the Court of Appeals in the above entitled cause, the following:

1. Bill of Complaint and exhibits thereto.
2. Answer of Isobel H. Lenman.
3. Answer of Jeannette R. Lenman.
4. Replication.
5. Depositions and exhibits filed on behalf of the complainant and defendants.
6. Decree of the Court and appeal noted therefrom filed June 15th, 1908.
7. Memorandum of filing of appeal and supersedeas bond.

A. S. WORTHINGTON,
Solicitor for Defendant, Isobel H. Lenman.

264 *Order Extending Time to File Transcript of Record.*

Filed June 24, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 25493.

THOMAS R. JONES
vs.
ISOBEL H. LENMAN ET AL.

On motion of counsel for Isobel H. Lenman, it is this 24th day of June, 1908, ordered that the time for filing the transcript of record in the above entitled cause in the Court of Appeals, be, and the same hereby is, extended to and including the 15th day of September, 1908.

ASHLEY M. GOULD, *Justice.*

265 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 264, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in Cause No. 25493 Equity wherein Thomas R. Jones is Complainant and Isobel H. Lenman *et al.* are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of September, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1955. Isobel H. Lenman, appellant, *vs.* Thomas R. Jones. Court of Appeals, District of Columbia. Filed Sept. 12, 1908. Henry W. Hodges, Clerk.

Addition to Record per Stipulation of Counsel.

Court of Appeals, District of Columbia, October Term, 1908.

No. 1955.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

~~Appeal from the Supreme Court of the District of Columbia.~~

Filed October 7, 1908.

Addition to Record per Stipulation of Counsel.

Court of Appeals of the District of Columbia, October Term, 1908.

No. 1955.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the appellant and the appellee respectively that "Exhibit E," introduced in evidence during the testimony of James J. Lampton, and referred to on page 38 of the record, and inadvertantly omitted from the transcript made in the Court below, a duly certified copy of which is hereto attached, shall form a part of the record in this case for the consideration of this Court.

CHAS. A. DOUGLAS,
For Darlington & Self.
A. S. WORTHINGTON,
Attorney for Appellant.

EXHIBIT E.

Office of Early & Lampton, Real Estate & Loan Brokers, 615 14th Street N. W.

WASHINGTON, D. C., *May* 2, 1905.

Received of Thomas R. Jones a deposit of Five Hundred ($500.00) Dollars, to be applied to part payment of purchase of sub Lots 4, 5, 6 & 7 Square 222 known as the Lenman Building sold him for Two Hundred and Thirteen Thousand, Two Hundred and Fifty ($213,250.00) Dollars on following terms: all cash. Property sold is a good title, or deposit to be returned and sale declared off. Seller

and her agents assume no responsibility for cost of Abstract, should title upon examination prove defective, nor for any damages by reason of said title proving defective. All taxes, interest, rents and insurance to be paid to date of delivery of deed by owner purchaser is required, and agrees to make full settlement, in accordance with terms of sale, within five days from this date, or forfeit deposit.

Seller to give the usual Special Warranty Deed. Conveyancing at purchaser's cost.

EARLY & LAMPTON,
Agents for F. E. Wilhoite, Owner.

Confirmed, ratified and approved:
F. E. WILHOITE, (*Owner.*)
THOMAS R. JONES, (*Purchaser.*)

(Endorsed.)

Cr. By Cash on the within contract..... $100.00

EARLY & LAMPTON.

May 2nd, 1905.

The within contract is hereby extended to May 29, 1905, all other conditions to remain unaffected and in full force & effect.

EARLY & LAMPTON.

May 5th, 1905.

Witness: and on behalf of Thomas R. Jones:
WM. D. HOOVER.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify that the foregoing is a true and correct copy of "Exhibit E" offered in evidence as a part of the deposition of James J. Lampton, whose said deposition was filed on behalf of the complainant July 11, 1907, in cause No. 25,493, Equity, wherein Thomas R. Jones is Complainant and Isobel H. Lenman, et al. are defendants, the same having heretofore been inadvertently omitted from the transcript of record heretofore transmitted to the Court of Appeals of the District of Columbia in said cause.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of October, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

[Endorsed:] No. 1955. Isobel H. Lenman, appellant, vs. Thomas R. Jones. Addition to Record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Oct. 7, 1908. Henry W. Hodges, Clerk.

MONDAY, *January* 18*th, A. D.* 1909.

No. 1955.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

The argument in the above entitled cause was commenced by Mr. A. S. Worthington, attorney for the appellant, and was continued by Mr. J. J. Darlington, attorney for the appellee.

TUESDAY, *January* 19*th, A. D.* 1909.

No. 1955.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

The argument in the above entitled cause was continued by Mr. J. J. Darlington, attorney for the appellee, and was concluded by Mr. A. S. Worthington, attorney for the appellant. On motion both sides are allowed to file additional authorities herein if so advised.

No. 1955.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This is an appeal from a decree of the Supreme Court of the District of Columbia directing specific performance on the part of appellant, one of the defendants below, of a contract of sale of certain real estate situated in the city of Washington.

In the year 1892, John T. Lenman died intestate seized of a large amount of real estate, among which was the property in question, lots 4, 5, 6, and 7, in square 222, in this city. He left surviving him his widow, Jeannette R. Lenman, and, as his only heir at law, his daughter Isobel H. Lenman, the appellant, hereafter referred to as defendant.

It appears that sometime prior to the execution of the agreement which forms the basis of this action, the real estate firm of Early & Lampton, doing business in Washington at the time, sent one Peake, who had represented the defendant and her mother in some business transactions, to ascertain if they would exchange the property in question for certain property belonging to one Stilson Hutchins.

This proposition was declined. Early & Lampton then sent Peake to ascertain what the property could be purchased for. This was followed by a series of offers by Peake ranging from $80,000 to finally $180,000. When this offer was made, Peake testified that Mrs. Lenman replied that she would take $200,000 net for the property. Defendant and her mother testify that the mother said she would not take less than $200,000 net. This discrepancy in the evidence, we think, is immaterial, since the bill has been dismissed as to the mother, and the defendant can not well defend against a subsequent instrument in writing upon a mere discrepancy as to what her mother said at this interview. The record discloses that, at this meeting, a conversation was had about the length of time Peake should have to secure a purchaser at the price named by Mrs. Lenman. This occurred on May 2, 1905, and the time agreed upon by the three was twenty-eight days, which would carry it to June 1st.

Peake informed Early & Lampton that the property could be purchased for $200,000 net, whereupon an agreement was entered into by which they were to pay Peake a commission of $1,500 for his services. Pursuant to this agreement the following instrument in writing was prepared:

"Office of Early & Lampton, Real Estate & Loan Brokers,
615 14th Street N. W.

"WASHINGTON, D. C., *May 2nd*, 1905.

"Received of Fannie E. Wilhoite, a deposit of one hundred ($100.00) dollars, to be applied to part payment of purchase of sub-lots 4, 5, 6 and 7, square 222 known as the Lenman Building, sold her for two hundred thousand dollars net on following terms: $50,000.00 cash, balance of $150,000.00 to be secured by deed of trust, payable in 3 years with interest at the rate of four and one-half per centum per annum, on the property sold. Property sold as a good title, or deposit to be returned and sale declared off. Seller and her agents assume no responsibility for cost of abstract, should title upon examination prove defective, nor for any damages by reason of said title proving defective. All taxes, interest, rents and insurance to be paid to date of delivery of deed. Purchaser is required, and agrees to make full settlement, in accordance with terms of sale, within twenty-eight days from this date.

"Seller to give usual special warranty deed. Conveyancing at purchaser's cost.

"EARLY & LAMPTON,
"*Agents for Fannie E. Wilhoite.*

"Confirmed, ratified and approved:

"ISOBEL H. LENMAN (*Owner*).
"FANNIE E. WILHOITE.
"FANNIE E. WILHOITE (*Purchaser*).
"Per E. & L."

Peake took this agreement to the defendant for the purpose of securing her signature to it. Some conversation ensued between them as to the advisability of defendant's selling the property, when Peake advised her to take the contract to her attorney, and consult with him before she signed it. After a protracted consultation with the attorney, defendant returned to Mr. Peake's office, where she met Mr. Lampton, who explained to her that Peake was to receive $1,500 for his services in the transaction. After considerable conversation not material to this inquiry, defendant signed the confirmation of the agreement appearing on the face of the contract. On its face, the agreement named Fannie E. Wilhoite as the purchaser. After defendant signed the confirmation as owner, it was signed by "Fannie E. Wilhoite," and it was further signed "Fannie E. Wilhoite (purchaser) per E. & L.," the agreement having been originally signed by "Early & Lampton, agents for Fannie E. Wilhoite."

It further appears that some days before these transactions of May 2d occurred, Mr. Lampton had asked the appellee, plaintiff below, who was president of the National Savings and Trust Company, which owns and occupies the property immediately adjacent to the property here in controversy, as to the value of the Lenman property. Plaintiff stated that it would, in his opinion, be a good purchase at from $175,000 to $200,000; adding that, if Lampton secured the property within those figures, to let him know before he made any disposition of it. The record does not disclose that defendant had any knowledge of plaintiff's connection with the transaction at the time she ratified the sale; nor does it disclose that plaintiff Jones had at this time done anything further than is above stated.

On May 3d, the day following the signing of the agreement, Lampton had a conversation with the plaintiff, which resulted in the execution of a contract for the sale of the property in question from Fannie E. Wilhoite to the plaintiff for a consideration of $213,250. This agreement was as follows:

"Office of Early & Lampton, Real Estate and Loan Brokers,
615 14th Street N. W.

"WASHINGTON, D. C., *May* 2, 1905.

"Received of Thomas R. Jones a deposit of five hundred ($500.00) dollars, to be applied to part payment of purchase of sublots 4, 5, 6, & 7, square 222, known as the Lenman Building, sold him for two hundred and thirteen thousand two hundred and fifty ($213,250.00) dollars, on following terms: All cash. Property sold as a good title or deposit to be returned and sale declared off. Seller and her agents assume no responsibility for cost of abstract should title upon examination prove defective, nor for any damages by reason of said title proving defective. All taxes, interest, rents, and insurance to be paid to date of delivery of deed by owner. Purchaser is required to make full settlement, in accordance with terms of sale, within five days from this date or forfeit deposit.

"Seller to give the usual special warranty deed. Conveyancing at purchaser's cost.

"EARLY & LAMPTON,
"Agents for F. E. Wilhoite, Owner.

"Confirmed, ratified, and approved:

"F. E. WILHOITE (*Owner*).
"THOMAS R. JONES (*Purchaser*).

(Endorsed:)

"Cr. By cash on the within contract..... $100.00

"EARLY & LAMPTON.

"MAY 2ND, 1905.

"The within contract is hereby extended to May 29, 1905, all other conditions to remain unaffected and in full force & effect.

"EARLY & LAMPTON.

"MAY 5TH, 1905.

"Witness: and on behalf of Thomas R. Jones:
WM. D. HOOVER."

While this agreement is dated May 2, 1905, the evidence shows that it was made the next day. It will be referred to hereafter as the contract of May 3d. On May 25th, as appears from the evidence, Fannie E. Wilhoite signed the following instrument:

"Whereas, the hereinafter mentioned Isobel H. Lenman made sale of the hereinafter described land and premises, unto Fannie E. Wilhoite;

"And whereas, the said Fannie E. Wilhoite has assigned her said purchase and all her interest in and to said land and premises, unto Thomas R. Jones, in evidence of which assignment the said Fannie E. Wilhoite has become a party to and executes these presents; and the said Thomas R. Jones having fully complied with the terms of said sale, is entitled to this conveyance.

"Now therefore,

"This deed, made this — day of ——, A. D. 1905, Witnesseth, that the said Isobel H. Lenman, only child and sole heir at law of John T. Lenman, deceased, of the District of Columbia, and the said Fannie E. Wilhoite, of the same place, hereinafter designated as the parties hereto of the first part, for and in consideration of the sum of ten dollars in current money of the United States, to each in hand paid by the said Thomas R. Jones, of said District of Columbia, hereinafter designated as the party hereto of the second part, receipt of which, at the delivery hereof, is hereby acknowledged, have bargained and sold, granted, enfeoffed and conveyed, and do hereby bargain and sell, grant, enfeoff and convey unto and to the use of the said party hereto of the second part, his heirs and assigns the following described land and premises, with the improvements, ease-

ments and appurtenances thereunto belonging, situate and lying in the city of Washington, in the District of Columbia, namely:

"Lots numbered four (4), five (5), six (6), and seven (7), in the subdivision made by the heirs of John Davidson, of lots in square numbered two hundred and twenty-two (222), as per plat recorded in Liber N. K., folios 63 and 64, of the records of the office of the surveyor of the District of Columbia.

"To have and to hold the said land and premises, with the improvements, easements, and appurtenances, unto and to the use of the said party hereto of the second part, his heirs and assigns, forever.

"And the said parties hereto of the first part do severally and respectively and not jointly hereby covenant to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

"In testimony whereof, on the day and year first hereinabove written, the said parties hereto of the first part have hereunto set their hands and seals.

"____ ____. [SEAL.]
"FANNIE E. WILHOITE. [SEAL.]

"Signed, sealed, and delivered in the presence of
"____ ____."

This deed was not acknowledged, though there was a blank attached for that purpose.

On May 5th, defendant called upon plaintiff and inquired if he was the purchaser of the property here in question. Plaintiff replied that he was. There is considerable conflict in the record as to just what was said at this interview, but it does not appear that defendant gave notice of any intention not to carry out her part of the agreement. On or about the 22d of May, defendant notified plaintiff to the effect that she could not make a good title to the property, as she had expected to do, for the reason that any conveyance she could give would be subject to the rights of her mother. Her mother at the same time notified plaintiff that she would not consent to any sale of the property or join in any deed or conveyance of the same. Plaintiff then notified defendant that he would accept a deed from her and would release her from any liability for any claim the mother might have in the property by reason of her dower interests. Upon the refusal of defendant to execute a deed in compliance with the statement of plaintiff, plaintiff, in compliance with the terms of the agreement between the defendant and Fannie E. Wilhoite, made a tender of $50,000 in cash, representing the cash payment under said contract, a promissory note signed by Fannie E. Wilhoite for the sum of $150,000, payable in three years, with interest at the rate of 4½ per cent per annum, and a deed of trust to be executed by plaintiff and his wife to secure the payment of the note, and further notified the defendant that he would accept a conveyance of the property from her without the concurrence of the mother. It was admitted by the defendant that the tender was legally made; but she refused to carry out the terms of the agree-

ment and refused to execute a deed for the premises or accept the tender made.

Upon such refusal the plaintiff filed a bill for specific performance of the agreement, making Isobel H. Lenman and Jeannette R. Lenman, her mother, defendants. At the hearing the bill was dismissed as to the mother, Jeannette R. Lenman, and a decree was entered requiring the defendant, Isobel H. Lenman, to specifically perform the said contract of May 2, 1905, by the execution of a conveyance to said property with a special warranty. From this decree the defendant has appealed to this court. Counsel for defendant rely upon the following assignment of errors:

"The court below erred:

"1. In holding that the so-called contract sued on was an enforceable written agreement by the appellant to sell the land described in it to Fannie E. Wilhoite.

"2. In holding that the appellee and those under whom he claims had not, by their conduct leading up to the execution of that instrument, precluded him from obtaining in equity the relief afforded him by the decree which is the subject of this appeal.

"3. In holding that the original vendee in this case, Fannie E. Wilhoite, and the appellee as claiming under her, were not precluded from maintaining a suit in equity for the enforcement of the alleged contract by the fact that she had resold the property at an advanced price, thereby fixing the amount of damages sustained by her and putting them to their remedy at law.

"4. In not holding that the National Savings and Trust Company was the real party in interest in bringing this suit, and that public policy forbids its obtaining a decree in its favor.

"5. In holding that the evidence proves that the appellee is the assignee of Fannie E. Wilhoite under said alleged contract, and that as such assignee he is entitled to maintain this suit.

"6. In not dismissing the bill of complaint as to the appellant, Isobel H. Lenman.

"7. In requiring the appellant to execute and deliver to the appellee a deed conveying to him the real estate in question."

Without considering the assignments of error separately, we think this case can be disposed of under a few general propositions. The contract of May 2, 1905, is assailed by counsel for defendant on the ground that it does not constitute an enforceable agreement of sale of real estate. Section 1117 of the Code of the District of Columbia provides: "No action shall be brought * * * upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, which need not state the consideration, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." In Grafton v. Cummings, 99 U. S., 100, the court declared the essential elements of a contract or agreement in writing under the statute of frauds to be, "that it shall contain within itself a description of the thing sold by which it may be known and identified, of the price

to be paid for it, of the party who sells it, and the party who buys it." In Salmon Falls Co. v. Goddard, 14 How., 455, the court, upholding a memorandum agreement, said: "The memorandum, therefore, contains the names of the sellers, and of the buyer, the commodity and the price, also the time of credit and conditions of the delivery, and in the absence of any specified time or place of delivery, the law will supply the omission."

Applying these rules to the case at bar, we have here an instrument, which, on its face, purports to be a receipt for $100, paid upon the purchase price of certain real estate therein specifically described, the terms of the sale of which are set forth in the instrument. This paper contains a description of the property; the consideration; the manner in which payment is to be made; the security for the deferred payments, with the rate of interest thereon; and the time within which the vendee is to make the cash payment and execute the securities for the balance. The document is signed by the agents of the purchaser. To this point, the name of the vendor is not mentioned, but the instrument is signed under the words "confirmed, ratified and approved" by "Isobel H. Lenman (owner)" and by "Fannie E. Wilhoite (purchaser)," the purchaser signing both personally and by Early & Lampton, her agents. These signatures appear to the left and immediately under the body of the instrument, and confirm, ratify, and approve the contents of the document itself. It would be absurd to hold that they do not refer to the paper to which they are attached, and of which they are a part. We must, therefore, consider the instrument as a whole. The signatures are necessary, both to indicate the buyer and seller and to give authenticity to the instrument. The agreement may be searched in order to ascertain who the parties are. As the court said in Barry v. Coombe, 1 Pet., 651, referring to the signature to a contract, "it does not signify much in what part of the instrument it is to be found." We find no difficulty in holding this instrument, when considered as a whole, and in view of the evident intent of the parties, to be such an agreement of sale as will support an action for specific performance. It is, therefore, unnecessary for us to pursue the discussion of this branch of the case. The instrument before us is sufficiently full and complete to meet every requirement of an agreement of sale essential to call for specific performance.

But, it is insisted that this agreement can not be enforced because the person signing it and purporting to be the owner was not, in fact, the owner, and had, therefore, no authority to contract for a sale of the property in question. On this point, both defendant and her mother testified that it was the intention of John T. Lenman, expressed shortly before his death, that the property in question should go to his wife, and certain other property should go to defendant. We think it neither necessary nor profitable to enter into an extended review of the evidence on this point, further than to refer to one fact in that connection. Both the defendant and her mother testified that, shortly prior to his death, John T. Lenman made certain written memoranda, in which he indicated the division he desired made of his property between the defendant and her

mother. When called upon to produce this memoranda, defendant produced one document in the handwriting of her father, in which he indicated it to be his desire that defendant should have certain property therein named, including "6 houses, New York Ave." It is conclusively shown by the evidence that the six houses above referred to included the property here in controversy. We think that a fair consideration of the evidence leaves no doubt as to the legal status of the defendant and her mother with relation to the property in question. No disposition was made by the husband and father during his lifetime that would operate as a specific devise of this property, and no arrangement has since been made between the mother and daughter that could be held to effect a change or conveyance of the title as fixed by law on the death of the intestate.

The record discloses that John T. Lenman died intestate in 1892, seized of the property in question, leaving the defendant as his sole legal heir. The legal title to the property descended to and vested in the defendant, subject alone to the widow's dower therein. Plaintiff is here insisting upon defendant performing her contract in so far only as she is capable. By the decree, the dower interest of the mother is protected. It perpetrates no hardship upon her. It only directs the defendant to carry out her agreement to convey the legal estate, which vested in her on the death of her father. In Harding v. Parshall, 56 Ill., 219, the vendors had contracted to give a conveyance with general warranty. They attempted to defend in a suit for specific performance on the ground that they could not give a good title. On this point the court said: "Can they now insist that because they do not have such title as they agreed to sell that they are exonerated from the performance of their contract, and that Parshall shall only have a restoration of his money? It is clear, beyond question, that appellant and Paullin could not compel Parshall to perform the contract unless they could show that they were able to convey such a title as they had contracted to give. But in this case he is willing to risk their title and receive it as they hold it, with the covenants they agreed to make. That such is the rule of law seems to be apparent. Otherwise a party would have the right to insist on a rescission simply because he was unable to perform his agreement. When parties enter into contracts they know that they do not have the option to rescind without the fault of the other party. This all business men know, and contract with a view to such a liability. The party who has performed or offered to perform his part of the agreement has the choice whether he will sue for and recover damages for a breach of the contract, or will insist upon its execution specifically, and take such a performance as the other party is capable of making." The case at bar is much stronger than the case cited, for the defendant only contracted to convey by special warranty, and that is all she is asked to do, or required to do, by the terms of the decree.

We are not impressed with the contention that the vendee Wilhoite must be considered as a mere dummy in this transaction, and not as the real purchaser. While we have little doubt that she was used by Early & Lampton for the purpose solely of a disinterested party

through whom the title could pass, yet we must be bound by the written instruments appearing in the record and evidencing the various transactions forming the basis of this controversy. The record will not permit us to treat the original purchase as one by Early & Lampton as agents for Jones as an undisclosed principal. It may be suggested that, if this were true, it would not improve the situation, so far as the defendant is concerned. It is well settled that an agent may enter into a contract for the purchase of real estate for an undisclosed principal, and that such principal can enforce specific performance of the contract against the vendor. In Kelly v. Thuey, 143 Mo., 438, the court said: "It is very familiar learning that the agent may enter into a contract for the purchase of land for an undisclosed principal; and a principal may maintain a suit in his own name and enforce the contract, it being immaterial whether the principal was known during the transaction, or whether the party supposed he was dealing with the agent personally and on his own behalf." In Pomeroy on Contracts (2d ed., sec. 89, page 128) it is said: "When the agreement is executed by an agent in his own name, he appearing to be the contracting party, the requisite as to parties is complied with. The principal may maintain a suit and enforce the contract, and it is immaterial whether the principal was actually known during the transactions, or whether the party supposed that he was dealing with the agent personally, entirely on his behalf. Under the same circumstances it is now the rule that a suit may be maintained and the contract enforced against the principal, even though his name nowhere appears on the face of the writing, and even though he was undisclosed and unknown to the other party at the time of entering into the agreement, provided, of course, it was actually made on his behalf."

Dismissing the above contentions, we come now to the one most difficult, and which we think must govern in this case, the transactions between Wilhoite, the original vendee, acting through her agents, Early & Lampton, and the plaintiff. These negotiations are evidenced by the two instruments in writing of May 3d and May 25th. The negotiations must be treated in their entirety in order to ascertain the nature of the conveyance actually made to plaintiff, and the character of title he is here asserting. The deed of May 25th must be considered as supplementary to the contract of May 3d. Regarding the whole transaction in this light, it can only be considered as a sale of the property, and not as a technical assignment of the rights of the vendee under the original contract. The agreement of May 3d is an express contract of sale of the property, without any reference whatever to the original contract. The deed of May 25th, which we think sufficiently executed to be a binding conveyance between Wilhoite and the plaintiff, is a deed of conveyance of the property. True, it contains the following recital: "The said Fannie E. Wilhoite has assigned her said purchase and all her interest in and to said land and premises, unto Thomas R. Jones, in evidence of which assignment the said Fannie E. Wilhoite has become a party to and executes these presents; and the said Thomas R. Jones having fully complied with the terms of said sale, is entitled to this conveyance." This recital can only refer to the

former agreement of May 3d. We must then look to that agreement, and not to the recital, to ascertain the intention of the parties. No reference is there made to the original contract; and it can not, therefore, be distorted into an express assignment of that contract. The record discloses no transactions or negotiations between Wilhoite and the plaintiff, except as evidenced by these two instruments. The deed was the completion of the sale as agreed upon in the contract, and not an assignment in express terms of the original contract. There is no such an assignment disclosed by the record before us.

Treating the original contract as an agreement for the sale of the property in question between the defendant as the owner and vendor and Fannie E. Wilhoite as the purchaser and vendee, and Early & Lampton merely as the agents for the vendee, can the plaintiff, as a subpurchaser from the vendee, enforce specific performance of the original contract against this defendant? With the signing of this agreement, the equitable title to the property passed to the vendee, and, therefore, defendant, as vendor, held the property as trustee for Wilhoite, the purchaser. As this court said in Griffith v. Stewart, 31 App. D. C., 29, when considering a contract for the purchase of land: "We are of the opinion that, as to the particular part of the estate of Ball involving the land in question, the sale effected a conversion, and thereafter Ball held the land as trustee for defendant; that, upon the execution of the contract, Ball's interest, as represented by the unpaid balance of the purchase price, became personalty, or a chose in action, and passed to the plaintiff executor as such. * * * Under the sale, the land became the property of the defendant, and the agreed purchase price became the property of Ball. In equity, Ball held the land as trustee for defendant, and defendant held the purchase price as trustee for Ball." This rule is too well established to call for further citation.

It follows that, the equitable title having become vested in Wilhoite, the legal title only remaining in the defendant, Wilhoite could convey it, encumber it, contract for its conveyance, or dispose of it in any way that she could if the legal title had actually passed to her. There seems to be no lack of authority in support of this principle. In Pomeroy's Equity Jurisprudence, sec. 368, it is said: "As the vendee has acquired the full equitable estate—although still wanting the confirmation of the legal title for purposes of security against third persons—he may convey or encumber it; may devise it by will; on his death intestate, it descends to his heirs, and not to his administrators; in this country, his wife is entitled to dower in it; a specific performance is, after his death, enforced by his heirs; in short, all the incidents of a real ownership belong to it. As the vendor's legal estate is held by him on a naked trust for the vendee, this trust, impressed upon the land, follows it in the hands of other persons who may succeed to his legal title—his heirs and his grantees, who take with notice of the vendee's equitable right. In other words, the vendee's equitable estate avails against the vendor's heirs, devisees, and other voluntary assignees, and his grantees with notice." In Lewis v. Hawkins, 23 Wall., 119, the court said: "Upon the execution of the notes and the title-

bond between Lewis and Hawkins, Lewis held the legal title as trustee for Hawkins; and Hawkins was a trustee for Lewis as to the purchase money. Hawkins was cestui que trust as to the former and Lewis as to the latter. * * * The equitable estate of the vendee is alienable, descendible, and devisable in like manner as real estate held by a legal title." It would seem, therefore, that the vendee Wilhoite had the power to enter into the contract of May 3d with plaintiff and agree to convey to plaintiff all her interest in the property in question which she acquired under her contract with the defendant, and plaintiff thereby succeeded to all the rights of the original vendee Wilhoite, with power to enforce the specific performance of the original contract against the defendant. In other words, regarding this transaction as a resale, and plaintiff as a subpurchaser, it results that plaintiff must be considered as the equitable owner of the property, with defendant as a mere trustee of the legal title under a trust to convey it to plaintiff upon his compliance, or tender of compliance, with the terms of the original contract of sale.

But, it is contended by counsel for defendant, that there is no such privity between plaintiff and defendant as will support an action for specific performance. With this we can not agree. We are cited to the case of Stratton v. California Land Co., 86 Cal., 353, which holds that an original vendee under a contract for sale of land can not, by making a re-sale to a third party, create such a privity between his vendee and the original vendor as will entitle the former to maintain an action for specific performance against the latter. This case, however, is opposed to the great weight of authority. The right to specific performance in cases similar to the one at bar does not depend upon the privity of the parties, but upon the character of title acquired by the original vendee and his power to confer the rights thus acquired upon his vendee.

In Buchanan et al. v. Upshaw, 1 How., 55, the complainants and those claiming under them purchased from one Buckner, paid a full price, and took deeds for the property in controversy. Buckner had purchased from one Shackleford who had no title to or interest in the land. Upshaw, the defendant, being the owner. Later, Shackleford and Upshaw entered into two separate contracts confirming the contract between Shackleford and Buckner. On this, the court said: "By these contracts alone Upshaw was bound; and on them the bill is founded, and a specific decree asked. They must be taken together; so the complainants treat them in their bill; nor can the court do otherwise." Quoting further from the opinion: "We also hold that there was privity of contract between Upshaw and the complainants. When he sanctioned Shackleford's contract with Buckner, he became a party to it: Buckner had assigned all its benefits to the complainants, and they must be treated as the rightful assignees; with the modifications imposed by the contracts of 1801 and 1803, between Upshaw and Shackleford. The equitable title being in the complainants by a contract complete in all its parts, they are entitled to a specific decree of course, on principles too familiar to require authorities to support them. On this

part of the case the court has had neither doubt nor difficulty in arriving at a conclusion favorable to a specific decree." In Randolph v. Wheeler, 182 Mo., 145, Randolph, the complainant, purchased land from one Darrell who had previously agreed to sell it to the defendant Wheeler. This suit was brought by Randolph as the vendee of Darrell to enforce specific performance of the contract between Darrell and Wheeler. Darrell was not a party to the suit, the court holding that the complainant, by the conveyance from Darrell, "accepted the same burdened with all the equities which appellant was entitled to assert under the contract of sale and on the other hand, by such conveyance, she acquired all the equitable rights possessed by her grantor, and in a court of equity can assert and maintain them." In Hunt v. Hyatt, 10 Colo., 278, where the vendee in the original contract conveyed the property by quitclaim deed to a third party, who brought an action for specific performance against the original vendor, the court said: "Such equitable interest may be assigned by the vendee or party who stands in the position analogous to that of the vendee, and the assignee may maintain an action to compel a specific performance of the contract. Pom. Spec. Perf., sec. 487; Wat. Spec. Perf., sec. 68; House v. Dexter, 9 Mich., 246. The quitclaim deed from Mrs. Rupe to the plaintiff conveyed by assignment the equitable right of Mrs. Rupe in the premises, and all her rights under the contract with Hunt. Miller v. Whittier, 32 Me., 203; Currier v. Howard, 14 Gray, 511; Bradbury v. Davis, 5 Colo., 265; Fitzhugh v. Smith, 62 Ill., 486. In the case last cited it held that the effect of a deed is made to depend rather upon the intention of the parties than upon the form of the deed."

It would seem that courts of equity make no distinction between the right of the assignee of the vendee of an original contract and the vendee of such person by purchase to enforce specific performance against the vendor in the original contract, the deed of conveyance operating not only as a conveyance, but as an assignment of all the equitable interest in the property held by the vendee under the original contract. In other words, the right of specific performance depends, not so much upon privity between the parties, although the court, in Buchanan v. Upshaw, supra, held there was privity between such parties under a deed of conveyance, as upon the right of the vendee to sell, encumber, convey, or contract for the conveyance of the property in which the equitable title has become vested by virtue of the original contract.

It is contended, however, that Wilhoite should have been made a party to this action. In the cases just cited the intermediate vendee and vendor was not held to be an essential party, but in other cases to which our attention has been called it has been held that such person is an essential party in an action similar to this for specific performance. While our attention has been called to no fixed rule on this subject, we think the particular circumstances of each case should govern. The object in requiring an intermediate party to be made a defendant is to protect both the plaintiff and defendant against any future liability to the intermediate party. Where it is

apparent to the court that no such liability can occur, it will not refuse to decree specific performance for such a defect of parties. It is difficult to understand just how the defendant can be damaged by the failure of Jones to make Wilhoite a party to this action. Defendant is fully protected by the decree so far as her obligation under her contract exists, and plaintiff has an enforceable contract against Wilhoite to which he can revert for any failure on her part to fulfill its conditions, if, in fact, those conditions have not already been fulfilled by the tender and signing of the deed of May 25th. But this is a matter between Wilhoite and the complainant of which defendant can have no concern. In this case, when the tender was made, Wilhoite, the intermediate party, was present. The deed in which she was made a party, and which she had signed, was presented to the defendant for execution, which was refused. Wilhoite, by the execution of this instrument, by her general tender of performance to both plaintiff and defendant, by the tender of her note for $150,000, in compliance with her contract with defendant, as well as by her agreement of sale with plaintiff of May 3d, is estopped from bringing her action against defendant for default under said contract, when defendant has complied with the decree of the court below. It may be observed, however, that, so far as the record discloses, no objection was made because of defect of parties in the court below, and it is doubtful if this objection is available in the first instance on appeal. Upon the evidence adduced in the trial, we think if the matter had been presented to the court below, it should have resulted in the same decree as was entered.

It is also insisted that there is nothing in the record to show that the contract between Wilhoite and the plaintiff of May 3d has been carried out, and in the absence of affirmative proof of this fact plaintiff can not assert any claim against the defendant as the assignee or vendee of Wilhoite.

It appears that Wilhoite was present when plaintiff tendered performance to defendant; that she signed the deed of May 25th, which was prepared to be jointly executed by both her and the defendant; that when the defendant refused to execute the deed, Wilhoite tendered herself ready to perform her contracts both with plaintiff and defendant, and that defendant still refused to carry out her contract, either with Wilhoite or the plaintiff. In the face of these facts defendant is not in a good position to inquire into either the state of the contract between Wilhoite and the plaintiff or their good faith in this part of the transaction. The contract and conveyance from Wilhoite to plaintiff was sufficient to vest in him her equitable interest in the property and to authorize him to institute and maintain this action.

Specific performance of a contract of sale is not a matter of course, but rests largely in the discretion of the court from a view of all the circumstances of the case. It will not be enforced where the contract is unfair or unequal in its terms, and where injustice would be perpetrated by its enforcement. This discretion also exists where the contract, though fair and just on its face, would, if enforced, by reason of subsequent events or collateral circumstances, work hard-

ship or injustice to either of the parties. It will not be enforced arbitrarily at the mere pleasure of the court. But, we find nothing in this tranaction that shows such injustice or unfairness as would authorize the court in refusing the relief sought. The consideration, it is conceded, was a fair one; the defendant before signing the contract was advised to consult her attorney, which she did; and when the contract was signed, there was a full explanation by the agents of the purchaser, the purchaser being present, as to the details of the transaction to that point. The record does not disclose that complainant had come into the transaction at the time of the signing of the contract. Defendant, two days later, called at the office of complainant, and was informed that he had purchased the property from the original vendee through her agents. No protest or objection was made by defendant, and not until several days afterwards did she object to carrying out the contract. Her objection was not made because of any injustice or unfairness that had been perpetrated upon her, but because her mother would not join in the conveyance. This objection was met by complainant's tendering performance upon condition of her executing a deed with special warranty conveying her individual interest in the property. Under this state of facts, we find no room for the exercise of discretion in favor of the defendant. The decree is affirmed with costs, and it is so ordered.

Affirmed.

TUESDAY, *March 2nd, A. D.* 1909.

No. 1955, January Term, 1909.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL,
March 2, 1909.

FRIDAY, *March 12th, A. D.* 1909.

No. 1955.

ISOBEL H. LENMAN, Appellant,
vs.
THOMAS R. JONES.

On motion of Mr. A. S. Worthington, of counsel for the appellant in the above entitled cause, It is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United

States, and the bond for costs is fixed at the sum of three hundred dollars, and the bond to act as supersedeas is fixed at the sum of fifty thousand dollars.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Isobel H. Lenman, as principal, and Jeanette R. Lenman, as surety, are held and firmly bound unto Thomas R. Jones in the full and just sum of Fifty thousand ($50,000) dollars, to be paid to the said Thomas R. Jones, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of March, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Thomas R. Jones and Isobel H. Lenman, and being numbered 1955 on the Docket of said Court a decree was rendered against the said Isobel H. Lenman and the said Isobel H. Lenman having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Thomas R. Jones citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Isobel H. Lenman shall prosecute said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

ISOBEL H. LENMAN. [SEAL.]
JEANETTE R. LENMAN. [SEAL.]

Sealed and delivered in presence of—

MARGARETTE CRAIGIE.
N. H. RIDGWAY.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

Surety satisfactory.

J. J. DARLINGTON,
Solicitor for Appellee.

[Endorsed:] No. 1955. Isobel H. Lenman vs. Thomas R. Jones. Appeal Bond. Court of Appeals, District of Columbia. Filed Mar. 16, 1909. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Thomas R. Jones, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Isobel H. Lenman is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 16th day of March, in the year of our Lord one thousand nine hundred and nine.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 16th day of March, A. D. 1909.

J. J. DARLINGTON,
S.,
Sol'r for Appellee.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 157 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Isobel H. Lenman, Appellant, vs. Thomas R. Jones No. 1955, January Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 17th day of March A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,556. District of Columbia Court of Appeals. Term No. 174. Isobel H. Lenman, appellant, vs. Thomas R. Jones. Filed March 17, 1909. File No. 21,556.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 19.

ISOBEL H. LENMAN, APPELLANT,

vs.

THOMAS R. JONES, APPELLEE.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District enforcing in favor of the appellee, Jones, specific performance on the part of the appellant, Isobel H. Lenman, of a contract for the sale for $200,000 of certain real estate in the city of Washington called the Lenman Building.

The land in question was formerly owned by John T. Lenman. He died intestate some years before the institution of this suit, leaving surviving him his widow, Jennette R. Lenman, and his daughter, the appellant. The appellee,

Thomas R. Jones, when this suit was instituted was the president of a corporation called the National Savings and Trust Company. The place of business of that corporation is on the northeast corner of 15th street and New York avenue northwest. The Lenman Building adjoins the Trust Company's property on the east. On the second day of May, 1905, Miss Lenman placed her signature to the instrument which the courts below have held to be enforceable as a contract on her part for the sale of the Lenman Building to one Fannie E. Wilhoite (Record, 5-6). That instrument is as follows:

Office of Early & Lampton, Real Estate and Loan Brokers,
615 14th Street N. W.

WASHINGTON, D. C., *May* 2, 1905.

Received of Fannie E. Wilhoite a deposit of one hundred ($100.00) dollars, to be applied to part payment of purchase of sublots 4, 5, 6, and 7, square 222, known as the Lenman Building, sold her for two hundred thousand dollars net on following terms: $50,000.00 cash; balance of $150,000.00 to be secured by deed of trust, payable in 3 years, with interest at the rate of four and one-half per centum per annum, on the property sold. Property sold as a good title, or deposit to be returned and sale declared off. Seller and her agents assume no responsibility for cost of abstract should title upon examination prove defective, nor for any damages by reason of said title proving defective. All taxes, interest, rents, and insurance to be paid to date of delivery of deed. Purchaser is required and agrees to make full settlement, in accordance with terms of sale, within twenty-eight days from this date.

Seller to give the usual special warranty deed. Conveyancing at purchaser's cost.

EARLY & LAMPTON,
Agents for Fannie E. Wilhoite.

Confirmed, ratified, and approved:
ISOBEL H. LENMAN (*Owner*).
FANNIE E. WILHOITE,
FANNIE E. WILHOITE (*Purchaser*),
Per E. & L.

Early & Lampton, whose names figure in this paper, were real-estate agents in Washington, and Fannie E. Wilhoite was a woman who had been a clerk in the employ of that firm.

By another instrument of the same date as the foregoing, but which appears to have been executed on the following day, Early & Lampton, as "agents for Fannie E. Wilhoite, owner," agreed to sell the same real estate to the appellee, Thomas R. Jones, for $213,250 (145-6). That contract is as follows:

Office of Early & Lampton, Real Estate and Loan Brokers,
615 14th Street N. W.

WASHINGTON, D. C., *May* 2, 1905.

Received of Thomas R. Jones a deposit of five hundred ($500.00) dollars, to be applied to part payment of purchase of sublots 4, 5, 6, and 7, square 222, known as the Lenman Building, sold him for two hundred and thirteen thousand two hundred and fifty ($213,250.00) dollars on following terms: all cash. Property sold as a good title, or deposit to be returned and sale declared off. Seller and her agents assume no responsibility for cost of abstract should title upon examination prove defective, nor for any damages by reason of said title proving defective. All taxes, interest, rents, and insurance to be paid to date of delivery of deed by owner-purchaser is required, and agrees to make full settlement, in accordance with terms of sale, within five days from this date or forfeit deposit.

Seller to give the usual special warranty deed. Conveyancing at purchaser's cost.

EARLY & LAMPTON,
Agents for F. E. Wilhoite, Owner.

Confirmed, ratified, and approved:
F. E. WILHOITE (*Owner*).
THOMAS R. JONES (*Purchaser*).

(Endorsed.)

Cr. By cash on the within contract..... $100.00

EARLY & LAMPTON.

May 2, 1905.

The widow of John T. Lenman, Jennette R. Lenman, as such widow, of course, had a dower interest in her husband's real estate.

On the 15th day of June, 1905, Jones filed a bill in equity in the Supreme Court of the District against the appellant, Isobel H. Lenman, and her mother, Jennette R. Lenman. He set up the execution of the paper of May 2, 1905, to which Isobel H. Lenman's signature was appended, charging that that paper was signed by Isobel H. Lenman "with the consent and authority of her codefendant, Jennette R. Lenman." He further averred that on the following day, May 3, 1905, "for a valuable consideration by him to her paid the said Fannie E. Wilhoite *sold, transferred, and assigned to the complainant herein all her rights in and under the aforesaid contract or agreement*" (2). It was charged in the bill that on or about May 22, 1905, the widow had notified Jones that she would not consent to the sale nor join in any deed to the property, and that at the same time Miss Lenman had informed him that she was unable to give a good and unincumbered title to the property. It was then averred in the bill that a formal tender of the amount to be paid under the contract with Wilhoite of May 2, 1905, had been made to Miss Lenman by Jones, who at the same time caused her to be informed that he would take the property subject to her mother's right of dower, but that this tender had been refused (3-4).

In her answer to the bill (10-15) Miss Lenman averred that after her father's death, in 1892, she and her mother, carrying out the wishes of her father as expressed to them before his death, had verbally agreed to a division of his property between them, in accordance with which agreement the widow became the sole owner of the Lenman Building. She denied having signed the instrument of May 2, 1905, with the consent or authority of her mother.

As to the alleged assignment by Fannie E. Wilhoite to Jones, Miss Lenman in her answer said that she denied that

there had been any assignment to Jones of the rights of Fannie E. Wilhoite in that contract, and she further said that the plaintiff had told her on or about May 5, 1905, that he had purchased the property from Wilhoite (or from Lampton) for $210,000 under an agreement requiring the sale to be closed within five days from May 3, 1905.

Miss Lenman substantially admitted the averments of the bill as to the refusal of herself and her mother to convey and as to the tender.

In his bill the plaintiff averred that his purchase "had been made for a special purpose in which he was and is greatly interested" (3). He did not state what that purpose was. In her answer Miss Lenman on information and belief averred that the real intended purchaser of the property was the National Safe Deposit, Savings and Trust Company (14).

The answer of the widow, Jennette R. Lenman, was substantially the same as that of her daughter (15-18).

A general replication to the answers having been filed and depositions on behalf of the several parties taken, the case came on for final hearing before Mr. Justice Gould, who, on June 15, 1908, signed a decree dismissing the bill as to the defendant Jennette R. Lenman but requiring Miss Lenman, upon payment by Jones to her of $200,000, to execute and deliver to Jones a deed with special warranty conveying to him in fee simple the real estate in dispute (142).

Miss Lenman appealed from this decree to the Court of Appeals of the District. That court affirmed the decree below (160). The opinion of the Court of Appeals was delivered by Mr. Justice Van Orsdel and will be found on pages 147-160 of the record in this case.

The details of the evidence, so far as it relates to the questions submitted to this court, will be referred to in discussing the respective assignments of error.

Assignments of Error.

The court below erred:

1. In not holding that the conduct of the appellee, Thomas R. Jones, and those under whom he claims, before and after the execution of the alleged contract of May 2, 1905, signed "Early & Lampton, agents for Fannie E. Wilhoite," precluded him from obtaining in equity the relief afforded him by the decree which is the subject of this appeal.

2. In holding that, notwithstanding the fact that the appellee, Thomas R. Jones, by his original bill in this case, sought to enforce the specific performance of the alleged contract sued on solely as assignee of Fannie E. Wilhoite of her rights under the alleged contract with her of May 2, he was entitled to a decree, although it appeared that instead of being such assignee he had agreed to purchase the property from her (or from Early & Lampton) on terms of sale entirely different from those embraced in the alleged contract between appellant and Fannie E. Wilhoite.

3. In holding that as such sub-purchaser the appellee had a right to maintain his suit, although he had not made the original purchaser, Fannie E. Wilhoite, a party to his bill and did not show or even aver that he, as a purchaser from her, was entitled to demand from her a deed conveying the Lenman Building to him.

4. In holding that the instrument of May 2, 1905, signed by Miss Lenman is such an agreement as is enforceable in equity, notwithstandng the statute of frauds.

5. In not reversing the decree of the Supreme Court of the District of Columbia and remanding the case to that court with instructions to dismiss the bill as to this appellant.

ARGUMENT.

I.

The First Assignment of Error.

As to whether the conduct of Jones and of those under whom he claims was such as to entitle him to the aid of a court of equity in the enforcement of the contract signed by Miss Lenman, dated May 2, 1905.

It is well settled that a court of equity will not as a matter of course decree specific performance of a contract in writing for the sale of real estate. If not satisfied that the plaintiff is morally as well as legally entitled to relief it will remit him to a court of law. This principle has been often recognized by this court. Thus in Willard *vs.* Tayloe, 8 Wall., 565, it was said:

> "When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine, 'is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under (the) circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it.'
>
> "And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In *Joynes vs. Statham* Lord Hardwicke said: 'The constant doctrine of this court

> is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law.' And in *Underwood vs. Hitchcox* the same great judge said, in refusing to enforce a contract: 'The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances.' "

In Pope Manufacturing Co. *vs.* Gormully, 144 U. S., 224-236, a decree was affirmed which dismissed a bill for specific performance of a contract relating to certain patents. Mr. Justice Brown, speaking for the whole court, said:

> "But whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts the specific performance of which a court of equity can be called upon to enforce. To stay the arm of a court of equity from enforcing a contract, it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in Cathcart *vs.* Robinson, 5 Pet., 264, 276, wherein Chief Justice Marshall says: 'The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled (10 Ves., 292; 2 Cox's Cases in Chancery, 77). It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation or any unfairness, are enumerated among the causes which will induce the court to refuse its aid.' This principle is reasserted in Hennessy *vs.*

Woolworth, 128 U. S., 438, 442, in which it was said that specific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, and always with reference to the facts of the particular case (Willard *vs.* Tayloe, 8 Wall., 557, 567; Marble Company *vs.* Ripley, 10 Wall., 339, 357; 1 Story's Eq. Jr., sec. 742; Seymour *vs.* Delancey, 6 John. Ch., 222, 224; White *vs.* Damon, 7 Ves., 30, 35; Radcliffe *vs.* Warrington, 12 Ves., 326, 331)."

Equity will often refuse to decree specific performance of a contract at the suit of one party where it would also refuse to rescind it at the suit of another (Clark *vs.* Reeder, 158 U. S., 505-531).

"And, here, it is important to take notice of a distinction between the case of a plaintiff seeking a specific performance in equity, and the case of a defendant, resisting such a performance. We have already seen, that the specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court. Hence, it requires a much less strength of case on the part of the defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain a bill to enforce a specific performance. When the court simply refuses to enforce the specific performance of a contract, it leaves the party to his remedy at law. An agreement, to be entitled to be carried into specific performance, ought (as we have seen) to be certain, fair and just in all its parts. Courts of equity will not decree a specific performance in cases of fraud or mistake; or of hard and unconscionable bargains; or where it would be against public policy; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would involve a breach of trust; or where a performance has become impossible; *and, generally, not in any cases where such a decree would be inequitable under all the circumstances.*"

Sec. 769, Story's Equity Jurisprudence.

As to the facts in the present case:

In May, 1905, Thomas R. Jones was president of the Trust Company which owned the property adjoining the Lenman Building, on the northeast corner of 15th street and New York avenue. At the same time William D. Hoover was the vice-president and trust officer of that company (141). William E. Edmonston had been the personal counsel of John T. Lenman for a number of years prior to his death, and after that time continued to act in that capacity both for his widow and his daughter, the appellant in this case. Mr. Edmonston was a member of the board of directors of the Trust Company. He was also the president of one of the principal title companies of the District. Albert T. Coumbe had been collecting the rents of the Lenman Building as agent of the owners for about eighteen years (84). Louis R. Peak was the secretary of a fire insurance company, and for several years had aided Miss Lenman in making investments (19, 20).

Coumbe testified as a witness for Miss Lenman that some time prior to May, 1905, Jones had asked him first if the Lenman Building was for sale, and later if the owners would sell that part of the property 25 feet front by the depth of the lot which adjoins the property of the Trust Company of which Jones was president. On both occasions, according to Coumbe, he saw Mrs. Lenman and Miss Lenman, and then informed Jones that they would not sell the property as a whole or the part of it referred to (85). Miss Lenman herself testified that prior to May, 1905, the Trust Company on several occasions had made propositions for the purchase of the property through Mr. Coumbe (69), which were always rejected (69-78). Jones was not examined as a witness until he was called in rebuttal. He then stated that the only offer which had been made by the Trust Company in this connection was an effort to buy the 20 or 25 feet front which adjoined the Trust Company's property on the east. He admitted that this offer was made through Coumbe, and that it was rejected (138-139).

Shortly before the 2d day of May, 1905, Hoover, the vice-president of the Trust Company, went to Edmonston's office and inquired whether the Lenman Building was for sale. Edmonston told him he had heard nothing about it being for sale, and advised him to see Miss Lenman or Mr. Peak—that if it was for sale they would know about it (80-81).

About this time—the exact date is not fixed—Peak, instigated by Lampton (20), began going to the house where Miss Lenman and her mother were living and making offers for the Lenman Building, beginning with an offer of $90,000 and going up by easy stages to $180,000. All of these offers were refused. But when the offer of $180,000 was made Mrs. Lenman, according to Peak, "kind of said" that she would take $200,000 (21). Accordng to both Miss Lenman and her mother, what the latter said was that she would not take anything less than $200,000 (50-56). Lampton testified as a witness on behalf of Jones that after this last conversation Peak reported to him that he had seen Miss Lenman and that she said she would not take less than $200,000 net for the building (36). Thereupon a very suggestive question was put to him by Jones' counsel, whereupon he changed his answer and said that Peak said she was willing to take $200,000 for the building (36).

This conversation occurred on the morning of May 2. Immediately Lampton prepared the agreement of that date which bears Miss Lenman's signature, and Peak took it to Miss Lenman and suggested to her that she consult Edmonston (27). Being asked on cross-examination why he referred her to Edmonston, he answered: "I don't know; Mr. Edmonston is Miss Lenman's attorney." He was asked if he knew at that time that Mr. Edmonston was one of the directors of the Trust Company, and he answered that he did (28).

Pursuant to this suggestion Miss Lenman called up Mr. Edmonston's office by telephone, and being informed that

he was there, she said that she would be down to see him in a few minutes. She went directly to his office, and after waiting an hour or an hour and a half he appeared, stating that he did not receive her message. She then showed him the paper which Lampton had prepared.

Inasmuch as much stress is laid upon this interview by the Court of Appeals, in its opinion in this case, as showing that Miss Lenman had the advice of her counsel before she signed the contract, her evidence as to it is given in full.

> "* * * I went to the telephone and called up Mr. Edmonston's office. They told me he was there, and I said that I would be down in a few minutes. I went directly to his office, and when I got there they told me Mr. Edmonston was not in. I said: 'That is a very strange thing. I telephoned him I would be here.' Well, they said that he had gone out and would probably be in in a few minutes. I think I waited for an hour or an hour and a half before Mr. Edmonston appeared. I was very much annoyed at that, having taken the trouble to ask him to be there. When he came in he came in very pleasantly. I said: 'Mr. Edmonston, I do not understand why, when I telephoned to you, you could not have sent me word that you would not be in the office.' 'Why,' he replied, 'I did not get the message.' That, of course, embarrassed me before our conversation began. I at once took the paper out of my pocket and said: 'Here is a paper which purports to be an option for the sale of the Lenman Building, and I would like to talk with you about it.' Mr. Edmonston sat looking at it, and said: 'Why, there is only $100 here as a deposit, and that is a very small amount in proportion to the amount you are going to get for the property.' I said: 'Yes, sir; I know that; but I feel in honor bound, not having made any objection to such a sale, to stand by my word.' 'Well,' he said, 'if that is the case, then it is all right.' Then he said to me: 'Mr. Hoover was in a day or so ago, and asked if you wanted to sell the Lenman Building, and I told him that he had better

> go to you or Mr. Peak if he wanted any information about it.' Then I think he said: 'I am on the board of directors of the Savings Company.' He mentioned the fact that Mr. Hoover was connected with this Savings Company, and that he (Mr. Edmonston) was on the board of directors. I said: 'Mr. Edmonston, the sale, as I understand it, is to be made to Mr. Stilson Hutchins.' That about ended the interview. There was nothing more said of any importance that I remember. I was very much disconcerted, and I did not pay very much attention to his mention of Mr. Hoover in that connection until I thought it over when I went home" (56-57).

Edmonston was not asked any questions as to this interview by counsel on either side, so that there was not a particle of evidence in the case that Miss Lenman received any advice whatever from him in the matter, except the suggestion that $100 was a small deposit on a two hundred thousand dollar transaction.

On the contrary, Miss Lenman testifies that on the morning of Friday, May 5, Edmonston, Peak, and Coumbe being then at her house, she turned to Coumbe and Peak when Edmonston came in and said, "Gentlemen, this is the gentleman you go to for advice and get none," and that Edmonston said in rather a hesitating way, "I did not want to butt in." She adds, referring to this interview, "Then we conversed about the subject, and still Mr. Edmonston did not commit himself in regard to the Savings Company at all, so that I was still in doubt as to who was the real purchaser" (61).

And in reference to this conversation Miss Lenman is corroborated by Coumbe, who testifies that he went to Miss Lenman's house on the morning of Friday, May 5, and there met Peak and Edmonston. After referring to Miss Lenman being very much disturbed about this transaction, he says:

> "I think Miss Lenman did say as Mr. Edmonston came in, 'Well, and this is the gentleman of whom I

ask advice and do not always get it'—or something to that effect" (88).

Upon leaving Edmonston Miss Lenman went to Peak's office, where she met Lampton and Peak. She then signed the contract, receiving Lampton's check for $100. This check was never cashed (60). The other party to the contract, it is admitted, was a mere dummy. Obviously, this means was resorted to so that all the liability save as to the $100 should be on one side.

Shortly before May 2, 1905, Lampton told Peak that $1,500 was the amount he was to receive if the sale went through for $200,000 (26-38). There was no reason why Peak's services should have been engaged in this case except for the fact that he had acted for some years for Miss Lenman and her mother in making investments for them, and as their trusted agent might be supposed to have some influence with them. He had never in his life sold a piece of property for anybody (32). He had never had anything to do with the Lenman Building (22). Lampton admitted that he had never known Peak to have anything to do as representing Miss Lenman and her mother in selling real estate, and that he also knew that Coumbe was the agent for the Lenman Building in the collection of rents (39). When Peak went to see Miss Lenman about the property he told her that Lampton did not wish her to say anything about the sale to Coumbe. Obviously, he went to Peak and instructed him not to let Coumbe know what was going on because he feared that Coumbe would suspect that the Trust Company was secretly trying to acquire the property. Later (and on or about May 2, when the contract was signed) Lampton himself went to Coumbe ostensibly to get information about leases and rentals, and told Coumbe it was important to get the information at once because the prospective purchaser, Hutchins, was about to go abroad (87, 88). When Lampton first engaged Peak's services in this matter he told him to "keep it quiet," without giving any reason for that request (22). Peak complied with this admonition (25).

While the negotiations between Peak and Miss Lenman and her mother were going on the former urged them to make the sale, arguing, among other things, that the net receipts from the property would amount to less than the interest which they would obtain on the $200,000 purchase money (70). At this time Miss Lenman did not know that Peak was expecting to receive compensation from the purchaser. She was not informed of that fact until she was at Peak's office when the contract of May 2 was signed (58).

When Miss Lenman signed the instrument of May 2 she supposed that it was merely an option, and that no sale could be made unless it should finally be submitted to her mother for approval (72). When the conversation between Peak and Mrs. Lenman at the latter's house took place on the morning of May 2, there was some talk then about an option (56). When Miss Lenman went to see Edmonston she referred to the paper as an option (57). That she did think she was signing an option is made entirely clear by the testimony of all the persons present at the time. Peak says that Miss Lenman then said to Lampton "something about she didn't want the proposition hawked around—that she didn't want Mr. Lampton to go everywhere in order to get a purchaser for the property—something like that" (24). And Lampton himself testified that when Miss Lenman signed the paper she said, "Mr. Lampton, I would rather you would not hawk this property around," and that he replied that he would not. Miss Lenman says that at the meeting at Peak's office when the paper was signed Lampton said to her that he wished the matter to be kept quiet, and that she then said to him, "You are not to hawk this property about the city. I wish that distinctly understood" (59).

It is manifest from this that both Peak and Lampton knew when Miss Lenman signed this paper that she did not understand that she was signing an absolute contract for a present sale. And this mistake on her part was partly induced no doubt by the peculiar character of the instrument itself.

Miss Lenman's signature is not found at the place on the paper, where it would naturally and properly be. At that place we find the signature of Early and Lampton as agents for Wilhoite. Instead of acknowledging the receipt of the $100 Miss Lenman is made by this paper to approve and ratify the receipt of the money by Early and Lampton. And the contract is the contract of Early & Lampton, agents, approved by Miss Lenman.

It will be remembered that by the first contract only $50,000 was to be paid in cash, while the sale to Jones was for all cash. When Miss Lenman was at Peak's office and had signed the first contract Lampton said to her, "I suppose you have no objection to accepting all cash," and she answered, "I have very serious objection to accepting all cash" (58). Yet, according to Lampton's own testimony, when he met Jones the next morning and signed the all-cash agreement with Jones he says he made that agreement with Jones because Jones preferred to pay all cash, and he thought he could arrange with Miss Lenman to accept the entire amount in cash (39). Just how an all-cash resale could be carried out under a one-fourth-cash original sale we are not advised.

It was 5 o'clock in the afternoon or later on May 2 when Miss Lenman left the office of Peak after signing the paper (63). Early the next morning Lampton met Jones in the Trust Company's office and they then and there signed a paper which resold the property to Jones for $213,250, all cash, payable in five days (145). Lampton had seen Jones several days before to inquire, as he says, what Jones thought the Lenman Building was worth, and Jones, according to Lampton, then said that if he could get the property for from $175,000 to $200,000 to let him (Jones) know about it before he sold it to anybody else (38). Although Lampton testifies that this contract between him and Jones was in fact executed on the morning of May 3 (38), for some reason not explained either in the pleadings or in the testimony it is dated May 2.

Throughout the negotiations the greatest pains were taken by Lampton to mislead Miss Lenman as to the real purchaser whom Lampton was supposed to have in mind. Peak says that when Lampton engaged his services "there was something said about Stilson Hutchins" by Lampton. What it was he could not remember (22, 23). Miss Lenman testifies that Peak told her that Hutchins was the probable purchaser, and that when she went to see Mr. Edmonston (57) she told him she understood the sale was to be made to Hutchins (57).

It is quite evident that Mr. Edmonston went as far as he thought he properly could to undeceive Miss Lenman as to Hutchins being the purchaser. He took pains to tell her that Mr. Hoover had been in a day or so before asking if the Lenman Building was for sale; that he (Edmonston) had referred Hoover to Miss Lenman or Mr. Peak, and also that Hoover was connected with the Savings Company, and that he (Edmonston) was on its board of directors (57). But Miss Lenman had become so firmly convinced that Hutchins was the proposed purchaser that this remark of Mr. Edmonston's made no impression on her mind until she reached her home after going to Peak's office and signing the paper which Lampton had prepared (57, 71).

Having obtained Miss Lenman's signature to the paper in question the most extraordinary haste was resorted to in completing the purchase. When Jones was examined in rebuttal as a witness in his own behalf he said that he personally arranged with Edmonston about an examination of the title "within an hour" after he signed the contract of May 3 with Lampton (138). Edmonston, however, testifies that according to his recollection it was Hoover who came to see him on May 3 about obtaining a certificate of title of the property sold (81). There was introduced such a certificate dated May 6, 1905 (82), but Edmonston testifies that that instrument was written up "quite recently" and dated back; that he on May 3 reported verbally to Hoover that the title was

all right; that the deed from the two ladies would pass a good title and that he then prepared the deed. Hoover was not examined. With excessive kindness counsel for Jones offered to produce him if adverse counsel wanted him! (141). The preparation of the deed was completed on Wednesday, May 3, and at about half-past four o'clock in the afternoon of that day Edmonston telephoned to Miss Lenman to know if she and her mother were ready to sign it (63). Miss Lenman's testimony as to the haste in which this transaction was carried out is corroborated by every other witness in the case. She states it thus: "At 8 o'clock in the morning the proposition was made; and at 1 o'clock the option was presented for signature; and at 5 o'clock a check binding it was signed and it was consummated; and on Wednesday afternoon, the following day, we were asked if we were ready to sign the deed" (71).

Reflecting on what Edmonston had said about Hoover's visit to him Miss Lenman began to suspect that Jones or the Trust Company was Lampton's real principal (71). Accordingly on the morning of Friday, May 5, she called upon Jones at his office and had a conversation with him, the details of which are given by her on page 62 of the record, and by Jones on pages 136 to 139. Their statements are diametrically opposed to each other in almost every particular. She says that Jones then said to her:

> "I am the purchaser of the Lenman Building. You know the company could not hold it unless we use it; so I am buying it for the company."

Miss Lenman further testified that at this interview with Jones he indicated that the company and not himself was the real party in interest by saying:

> "*We* don't expect to make any changes" * * * "*We* are just going to put in a new entrance and a new elevator." * * * "We don't trust Lampton. *We* want to get this matter out of his hands just as soon as we can. *We* have our plans" (62, 63).

In singular confirmation of her testimony on this subject is the inadvertent use of similar expressions by Jones in his testimony in this case. Being asked when he first learned that there was a Mrs. Lenman, he stated:

> "When I applied to Mr. Edmonston as president of thatcompany, to rush the title. I stated to him that as *we* only had five days in which to close our contract, if *we* did not get the title and papers ready in that time," &c. * * * "That if Early and Lampton undertook in any way to dispose of the property without coming to *us*, such effort could be blocked by the widow's dower." * * * "The remark was that *we* had but five days to close the contract, and Early and Lampton might be disposed to contract elsewhere unless *we* completed it within that time, and therefore I was anxious to get it out as quickly as possible." * * * "That in case that building should pass into any other hands that were not friendly to *our* company *we* might be prevented from getting a part of it to add to *our* rear line" (139).

Both Miss Lenman and her mother having refused to sign the deed which Edmonston had prepared, counsel for Jones at Edmonston's office made a formal tender to Miss Lenman on the 25th day of May, 1905. What occurred at that time is testified to by Mr. Darlington (47-49). Mr. Hoover was present on that occasion. Mr. Darlington, in making the tender, offered to hand to Miss Lenman $50,000 in legal-tender notes which he had obtained from Jones (49). Jones had "borrowed" the money from the Trust Company. He says of it that it was "held on memorandum pending the conclusion of the loan, not an unusual performance" (140). And in the same connection it appears that the Trust Company was to be secured for this $50,000 by a lien on the property Jones was buying. The deed of trust to secure the Wilhoite note of course would be the first lien. To the casual observer this would seem to be a singular transaction if, as Jones swears, the Trust Company was not interested in the purchase. Besides, Jones' contract with

Wilhoite was to pay the $200,000 all in cash and there is neither evidence nor averment that any change in that contract was ever made.

It will be remembered that by the contract dated May 2 between Jones and Lampton the deposit of $500 which Jones had made was to be forfeited, unless he paid the whole of the purchase money in cash within five days from May 2. On the back of that contract (146) is the following endorsement:

> "The within contract is hereby extended to May 29, 1905, all other conditions to remain unaffected & in full force and effect.
>
> EARLY & LAMPTON.
>
> MAY 5, 1905.
>
> Witness and on behalf of Thomas R. Jones:
> WM. D. HOOVER."

When Lampton was asked by counsel for Jones how that extension came to be made, he replied: "Mr. Jones notified us that it would be impossible to have the Title Company's report ready within the time specified in this contract" (38). That this statement if made by Jones to Lampton was not true is apparent from the fact that Jones, either in person or through Hoover, on May 3, accepted as sufficient Edmonston's verbal statement that he knew that a deed from Miss Lenman and her mother would convey a good title, and directed him to forthwith prepare such a deed. The deed had been prepared, and Miss Lenman and her mother had been called upon to execute it before this extension was made.

It is obvious that the real reason for the extension was either that Miss Lenman and her mother would not sign the deed, and Wilhoite could not carry out her contract for that reason, or, what is more probable, that the whole transaction was a mere cover for an indirect purchase by or for the Trust Company which it had found it impossible to obtain by direct means.

Even when he filed his bill of complaint in this case, Jones carefully concealed from the court the real nature of the transaction between him and Lampton. In fact, he made no mention of Lampton's connection with the transaction, and as to the contract of May 3, 1905, between him and Lampton, instead of stating that it was in writing and filing a copy of it as an exhibit to his bill, he alleged that he was merely an assignee of Fannie E. Wilhoit's rights under her contract with Miss Lenman (2-3). He did not even say that the assignment was in writing. That would have suggested an inquiry why a copy of it was not filed with the bill.

After referring to Miss Lenman's call upon him at his office on the 5th of May, and stating that she did not then intimate that she did not propose to comply with the contract, he added, "Whereupon the complainant ordered an examination of the title and took the other necessary preliminary steps toward compliance therewith upon his part"—the fact being, as has been shown above, that before Miss Lenman made this call upon Jones, he, or Hoover for him, had seen Edmonston about the title, had accepted Edmonston's statement that it was good in the two ladies, and had directed Edmonston to draw a deed for them to execute. And before Miss Lenman's interview with Jones, Edmonston had already prepared the deed and had asked Miss Lenman and her mother whether they were ready to execute it.

So, it is worthy of note that in his bill (3) Jones stated that he had made this purchase "for a special purpose in which he was and is greatly interested," but he carefully concealed from the court what this "special purpose" was. He was not examined as a witness except in rebuttal, and even then he was not asked by his own counsel what this "special purpose" was. It was not until his cross-examination as a witness in rebuttal that he admitted that the purchase was really in the interest of the trust company. He said (139-140), when asked by adverse counsel what this

special purpose was, "that in case that building should pass into any other hands that were not friendly to our company, we might be prevented from getting a part of it to add to our rear line, and thus straighten out to a certain extent our line and get more space at that point."

In this connection it should also be noted that although Lampton told Miss Lenman at the time she signed the instrument of May 2, that his partner Early did not know anything about the transaction (58, 64), when examined as a witness in the case he said that his partner Early and himself were the real purchasers and that he (Lampton) had made an arrangement with Early that the latter should raise the $50,000 cash payment required (43).

This policy of deception was continued by the plaintiff's witness, Lampton, in his deposition. It is quite apparent that Lampton in this business was acting for Jones and that Jones was trying to conceal that fact, first from Miss Lenman, and afterwards from the court itself. When Lampton was examined as a witness he tried to account for engaging Peak in negotiating the purchase by contending that he was then acting for some other person or persons, notably one "Mr. Arthur Jordan." What he said on this subject in his cross-examination (39, 40, 41) will satisfy the court that his statements in this regard were wholly untrue. When he got Miss Lenman to sign the paper sued on he went directly to Jones and to nobody else. At the time of the signing of the paper he told Miss Lenman that he already had a purchaser. On this subject Peak testified that when Miss Lenman told Lampton that she didn't want him to be going around everywhere looking for a purchaser, Lampton at that time said something about his already having a purchaser (24). This, taken in connection with his testimony just referred to and the other circumstances of the case indicate clearly that Jones in the interest of the Trust Company was that purchaser.

Obviously it does not matter that Miss Lenman did not care particularly to sell to Hutchins or that she would have preferred to sell to somebody else. She was entitled to know with whom she was dealing, or at least not to be misled in that regard. This has been held in several well-considered cases. In New York Brokerage Company *vs.* Wharton, 143 Iowa, 61-66, specific performance was sought by one Urdagen, who had agreed to exchange his goods in a store for land owned by the defendant. He signed the contract as New York Brokerage Company, representing in substance that he was the company when in fact he was only the "manager" of the company. In holding that the company could not have specific performance the court said:

> "This being true Urdangen was not a party to the contract at all. The real parties to the contract were persons never disclosed to the defendants. It is argued that this was not a material fact, and that misrepresentation with reference to it furnishes no ground of complaint. We think otherwise. It is the right of a party to a contract to know with whom he deals unless he consents to deal with an agent in behalf of an undisclosed principal. He has a right to rely upon representations made as to the identity of the other party to the contract, and, if deceived by such representations, he has a right to rescind. *Ellsworth vs. Randall*, 78 Iowa, 141; *Rodliff vs. Dallinger*, 141 Mass., 1 (4 N. E., 805; 55 Am. Rep., 439); *Fox vs. Tabel*, 66 Conn., 397 (34 Atl., 101). All the conversation and conduct of Urdangen, both before the contract was signed and afterwards, and while an invoice was attempted would indicate that he regarded himself as the owner of the goods. Under the showing made in his testimony, he incurred no liability whatever in the signing of such contract, but simply undertook to bind other persons who were wholly unknown to the defendants. We think the defendants were entitled to resist specific performance upon this ground, if there were no other."

The cases cited in the foregoing case fully sustain the proposition that a misrepresentation as to the party who is buying or selling is fatal without regard to the respective characters of the real and the pretended party.

Ellsworth *vs.* Randall, 78 Iowa, 141, was a bill for specific performance against the vendor in a contract for the sale of land. The defense was that the agent with whom the vendor dealt induced the latter to sell by telling him that he (the agent) represented the holder of the tax title. In refusing specific performance the court said:

> "It is urged by appellant that an agreement has been clearly established; that in making the sale defendant only desired to get the largest sum possible for his interest; that he was, in fact, indifferent as to the grantee, and that his interests were not prejudiced by the change. But it was the right of defendant to select his grantee. *Knight vs. Cooley*, 34 Iowa, 221. He gave to Lewis & Dodge no general authority to sell, but, at most, accepted an offer which he had been induced to believe was made by the tax-title owner, and was under no obligation to convey to another."

Rodliff *vs.* Dallinger, 141 Mass., 1, was an action of replevin by a vendor of goods who sought to recover them on the ground that he had been induced to make the sale by a misrepresentation. It was claimed by the plaintiff that he had refused to sell the goods to one Clementson personally, and finally made the sale to him nominally, but with the understanding, which was not embodied in the written contract or referred to in it, that he (Clementson) in the transaction represented another person whose name he did not wish to disclose. The opinion of the court was delivered by Justice Holmes, and it was held that it was not necessary to establish fraud in the case because there was no sale at all, as it turned out that Clementson was acting for himself and not for another and the vendor had not agreed to sell him.

Fox *vs.* Tabel, 66 Conn., 397, was an action for damages for a breach of contract by the defendant in failing to ac-

cept a marble monument. The defense was a misrepresentation by the agent who sold the monument as to the person who manufactured the same. This defense was sustained, the court saying:

> "The plaintiff contends that his fraud was immaterial because it does not appear that the defendant sustained any damage from it. It is enough that it does appear that the fraud was intended to induce her to execute the contract and that it had that effect. The plaintiff cannot ask the court to help him to profit by his own wrong. But the defendant was not bound to prove damage. A man has a right to choose whom he will employ. The reputation of a manufacturer or merchant may give a value to his goods which is quite independent of their actual quality. An order from A cannot be changed into an order from B without the buyer's consent."

II.

As to the Second Assignment of Error.

Relating to the ruling of the court below that although Jones in his bill of complaint claimed solely under an assignment alleged to have been made by Fannie E. Wilhoite to him on May 3, 1905, he is entitled to a decree in his favor against Miss Lenman merely as a purchaser from Wilhoite upon terms of sale differing in every respect from the terms of her contract with Miss Lenman.

The instrument sued on, it will be remembered, was executed on May 2, 1905. The bill, after setting up the signing of that paper proceeds:

> "Thereafter, to wit, on the 3rd day of May, A. D. 1905, for a valuable consideration by him to her paid, the said Fannie E. Wilhoite sold, transferred and assigned to the complainant herein all her rights in and under the aforesaid contract or agreement" (2).

The only way in which it can be pretended that Jones acquired any right to a conveyance to him of the Lenman building is that on May 3, 1905, he entered into a contract of purchase with Early and Lampton, as agents for Fannie E. Wilhoite, owner, by a writing which, for some unexplained reason, was antedated May 2, 1905, by which he agreed to purchase the property for $213,250, all to be paid in cash within five days (149).

Jones had early notice that his right to sue as assignee was controverted and had an opportunity to ask for leave to amend his bill so as to make it in this respect conform to the facts, for Miss Lenman in the third paragraph of her answer (12) distinctly denied this averment that he was an assignee of the rights of Fannie E. Wilhoite, and averred upon information derived from Jones himself that he was merely "a purchaser from said Wilhoite or said Lampton at the specified sum of $210,000 for the property and that the time for the completion of his purchase was fixed by his contract with said Wilhoite or Lampton at five (5) days." This averment of the answer was based upon what Jones had told Miss Lenman when she called at his office on the 5th day of May. There is no evidence that the other terms of the contract between Jones and Lampton were known to Miss Lenman until that contract was put in evidence at the taking of depositions in the case, nor does it appear that until that time she had any notice of the alleged extension to May 29, 1905, of the contract between Jones and Lampton.

It is submitted that under these circumstances Jones' bill should be dismissed because he has not only failed to prove the title he relies upon in his bill but has himself proved that he never had any such title.

It will no doubt be claimed here, as it was claimed below, that what took place on the 25th of May at the time of the tender made by Jones, amounted to an assignment by Miss Wilhoite. At that time a deed was produced which bears Miss Wilhoite's signature and which was tendered to Miss

Lenman for execution by her. This paper purported to convey the property in question here to Jones (6, 7). It starts out with the recital that the appellant had made sale of the property to Fannie E. Wilhoite, and that the latter had assigned her purchase and all her interest in the property to Jones, "in evidence of which assignment the said Fannie E. Wilhoite has become a party to and executes these presents" (6, 7). But this instrument was not prepared until on or about the 25th day of May, 1905, that being the date of the tender. It was signed by Fannie W. Wilhoite, and the appellant was also requested to execute it, but declined to do so. Fannie E. Wilhoite did not even acknowledge it, the notary's certificate appended to the paper being in blank and unsigned. It is apparent, therefore, that this instrument had no effect. It is neither averred nor proved that, in its incomplete condition, it was delivered or was intended to be delivered to Jones.

But aside from this, as already stated, Jones, in his bill, relied upon the alleged assignment of May 3, 1905, alone. He carefully avers that *after* that assignment, "to wit, on the 4th or 5th day of May, A. D. 1905, the said Isobel H. Lenman called upon the complainant" and made certain statements to him, "whereupon"—the bill proceeds—"the complainant ordered an examination of the title and took all other necessary preliminary steps towards compliance" with the alleged contract on his part. Now the evidence discloses beyond question that on the 3rd of May, 1905, Jones, either in person or through William B. Hoover, called upon Mr. Edmonston, the president of the Columbia Title Insurance Company, and ordered an examination of the title, so that by no possibility can the averments of the bill in reference to an assignment be held to refer to the inchoate deed of May 25, 1905. It is evident that Jones in his bill undertook to treat as an assignment from Mrs. Wilhoite her resale of the property to him.

On this subject Mr. Justice Van Orsdel, in delivering the opinion of the Court of Appeals, says:

> "This recital" [of an assignment in the deed in question] "can only refer to the former agreement of May 3d. We must then look to that agreement, and not to the recital, to ascertain the intention of the parties. No reference is there made to the original contract; and it cannot, therefore, be distorted into an express assignment of that contract. The record discloses no transactions or negotiations between Wilhoite and the plaintiff, except as evidenced by these two instruments. The deed was the completion of the sale as agreed upon in the contract, and was not an assignment in express terms of the original contract. There is no such an assignment disclosed by the record before us" (156).

In its opinion the Court of Appeals, however, after holding that there was no assignment as averred in the bill, goes on to hold that Jones was entitled to a decree for specific performance *as a sub-purchaser*. No weight or consideration whatever is given to the fact that Jones did not sue as a sub-purchaser; that the only right he set up in his bill was under an assignment which the Court of Appeals finds did not exist.

It is submitted that even where a plaintiff in a suit in equity has acted in good faith he cannot claim in one capacity in his bill and recover in another capacity on the evidence. This court, like most other courts in this country, in recent times has been liberal in considering difficulties growing out of a variance between allegations and proof, but has never gone so far as the Court of Appeals has gone in this case.

In Crocket *vs.* Lee, 7 Wheaton, 522, 527, Chief Justice Marshall, speaking for the court, said:

> "The counsel for the appellant says it would be monstrous if, after the parties have gone to trial on the validity of the entry, and have directed all their testimony in the circuit court to that point, their rights should be made to depend in the appellate court on a mere defect in the pleadings, which had

entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case.

"The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts."

In Sheehy *vs.* Mandeville, 7 Cranch, 208, 216, the court, through Chief Justice Marshall, held it to be a fatal variance that in a suit upon a promissory note it was treated in the declaration as a note payable on demand when it was in fact a note payable sixty days after date.

In Boone *vs.* Childs, 10 Peters, 177, it was held that a party who in a bill in equity set up a contract for the sale of land could not, on final hearing, rely upon an actual deed of conveyance of the land. This case is directly in point.

In Eyre *vs.* Potter, 15 How., 42, 56, it was held that the plaintiff could not succeed upon proof of a constructive fraud when in his bill he had relied upon actual fraud.

In Washington Railroad *vs.* Bradleys, 10 Wall., 299, 303, the court said:

"It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only

> what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

So in Rubber Company *vs.* Goodyear, 9 Wall., 788, a very important and leading case, it was held that evidence offered by the defendants in an equity case that the Goodyear patent was void because it was impossible to make merchantable goods according to it could not be considered because that defense was not set up in the answer. The court said:

> "In equity, the proofs and allegations must correspond. The examination of the case by the court is confined to the issues made by the pleadings. Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them."

In Wilson *vs.* Haley Live Stock Company, 153 U. S., 39, 47, the plaintiff had sued in an action of tort to recover by way of damages the value of cattle seized *and sold* by the defendant. It was held that judgment had been erroneously entered in his favor as for money had and received by the defendant to his use. Mr. Justice Brown, in delivering the opinion of the court in that case, said:

> "While undoubtedly, under the system of code pleading, a technical variance between the allegations and the proof is not deemed material, unless the adverse party is prejudiced thereby, still, where a cause of action or defense is not proven, not merely in some particular, but in its entire scope and meaning, it is treated by the authorities of those States, not as a case of variance merely, but as an entire failure of proof."

The system of "code pleading" here referred to has never been adopted in this District. There is a liberal provision for amendments at any stage of a case (District Code, sec.

399), but the rules of pleading both at law and in equity remain substantially as they were in 1801 when the District was ceded to the United States.

In the very recent case of Southern Railway Company *vs.* King, 217 U. S., 524, 536, this court said "It is elementary that the proof must conform to the allegations, and that without proper allegations testimony cannot be admitted."

In none of the foregoing cases did anything appear indicating that the variance which was held to be fatal was the result of deliberate intention to mislead. But this case is founded on deception. It cannot reasonably be disputed that when Miss Lenman was prevailed upon to sign the contract of May 2 Lampton was acting not for himself or for Early and Lampton or for Miss Wilhoite, but for Jones directly, and indirectly for the Trust Company. This was carefully concealed from Miss Lenman, and when the suit was begun it was carefully concealed from the court. When the bill was filed Jones appended as Exhibit A a copy of Miss Lenman's contract with Wilhoite; and as Exhibit B a copy of Wilhoite's note for $150,000, which was tendered to Miss Lenman; and as Exhibit C a copy of the deed signed by Wilhoite which was tendered to Miss Lenman for execution; and as Exhibit D a copy of the deed of trust which Jones offered to execute to secure the payment of the Wilhoite note; but he kept back the instrument upon which mainly his rights depended—the contract between him and Lampton dated May 2 and executed May 3. He evidently did not care to invite the attention of the court to the fact that within a few hours after Lampton purchased the Lenman Building for $200,000 (immediately, if business hours only be considered) he sold it to Jones for $213,250.

III.

As to the Third Assignment of Error.

As to the right of Jones as a sub-purchaser from Wilhoite to maintain his suit without making her a party, and even without averring or showing that he was entitled to a deed from her conveying to him the real estate in suit.

Referring to this point, it is said by the Court of Appeals (159) that "so far as the record discloses no objection was made because of defect of parties in the court below, and it is doubtful if this objection is available in the first instance on appeal."

If Jones had brought this suit in his real character as a sub-purchaser from Wilhoite without making her a party, the defendants would have had an opportunity to urge that the suit could not be maintained without bringing her into court, but in his bill he averred that she had assigned all her rights to him under her contract with Miss Lenman. If that were so, she was not a necessary party.

In their brief in the Court of Appeals, counsel for Jones stated that in the oral argument before Mr. Justice Gould counsel for Miss Lenman did not make the point that Miss Wilhoite was a necessary party. If that statement is made in this court, counsel for Miss Lenman wishes it to be understood that this is not admitted. The argument before Justice Gould was not reported, and the undersigned has very little recollection of what took place during that argument. But it is submitted that a case is not to be disposed of on appeal upon the recollection of counsel about matters that are not in the record and are not admitted.

But this objection is available on appeal whether it was made in the trial court or not. It has often been held by this court that the objection of want of parties may be made

here for the first time and may be made by the court if the parties do not make it.

Coiron *vs.* Millaudon, 19 Howard, 113.
Hoe *vs.* Wilson, 9 Wall., 501.

As far back as the case of Slacum *vs.* Pomery, 6 Cranch, 221, this court held, speaking through Chief Justice Marshall, that a ground for arrest of judgment may be raised in the appellate court for the first time.

In Washington Railroad *vs.* Bradleys, 10 Wall., 299, 303, some of the grounds upon which the decree below in that case was reversed were not made in the court below.

In Cragin *vs.* Lovell, 109 U. S., 194, 200, it appeared that an important State statute had been overlooked in the trial of the case in the circuit court, and it was held, notwithstanding, that the statute could be relied on in this court.

And in Barth *vs.* Clise, 12 Wall., 400, 403, it was held that a sheriff who had produced in court the body of a petitioner in a *habeas corpus* proceeding could not be held responsible for the prisoner's escape because he had undertaken, without an order of the court, to put him in the temporary custody of a third person. This objection was not made in the circuit court from which the case came to this court. In delivering the opinion Mr. Justice Swain said:

> "When such a defect exists, whether it be or be not brought to the attention of the court below or of this court by counsel, it is our duty to consider it and to give it effect."

The Court of Appeals held that where there has been a contract of sale or real estate from A to B, followed by a contract of sale on different terms by B to C, C may sue for specific performance as against A without making B a party to the suit. On this point the court refers to Buchanan *vs.* Upshaw, 1 How., 55, and to several cases in the State courts. It will be found upon examination of most of these

cases that in substance and effect they are cases in which the suit was brought by an assignee and not by one who had merely purchased from the original contract-vendee.

In Buchannon *vs.* Upshaw it appeared that Buchannon and the other parties who filed the bill of complaint in that case had acquired the land involved from one Buckner, who had no title, in 1798 and 1799. They paid Buckner in full, entered into possession of the land, lived on it and improved it for thirty years, reclaiming it from the wilderness, thereby increasing its value tenfold. Upshaw, who had the equitable title in 1797 and 1798, obtained in 1826 the legal title from the United States and then brought an action of ejectment against Buchannon and the other parties who purchased from Buckner, and obtained a judgment in ejectment against them in 1831. Before he got his legal title, however, he had in writing confirmed Buckner's title upon Buckner's agreement to pay him a certain sum of money, which sum was still due from Buckner to Upshaw when the judgment in ejectment was obtained. The suit was one in equity to enjoin ouster under the judgment in ejectment.

Buckner had acquired his supposed rights from one Shackelford long before Upshaw got his legal title from the United States, and it was the contract between Shackelford and Buckner which Upshaw had confirmed. It was in respect of this situation of the parties that the Supreme Court said:

> "We also hold there was privity of contract between Upshaw and the complainants. When he sanctioned Shackelford's contract with Buckner he became a party to it; Buckner had assigned all its benefits to the complainants and they must be treated as rightful assignees; with the modifications imposed by the contracts of 1801 and 1803 between Upshaw and Shackelford."

It will be seen that what the court decided is substantially this: That where there is a contract between A and B, and

A assigns his interest in it to C, and B assigns his interest in it to D, there is privity between C and D.

In the present case Wilhoite was paid nothing for the land, nor had she entered into possession. She has not assigned her interest in the contract with Miss Lenman to Jones, but has made a new and independent contract with him. There is no privity here. Miss Lenman could not have specific performance directly against Jones because Jones has never agreed, either with her or with anybody else, to buy the land upon the terms of $50,000 cash and $150,000 payable in three years, with interest at the rate of four and one-half per centum per annum. Jones is not entitled to specific performance directly against Miss Lenman, because the only agreement he has made is to purchase the land for $213,250.

If Jones had paid Wilhoite the $213,250 and had gone into possession, made valuable improvements, and held the land for thirty years and Miss Lenman had then sought to eject him, there would be some similarity between the case thus presented and Buchannon *vs.* Upshaw; as it is, the two cases are totally dissimilar.

In Willard *vs.* Tayloe, 8 Wall., 557, the court simply says, in passing, what we have not disputed in this case, that where there is a complete *assignment* of rights under a contract of purchase of real estate the assignee stands in the shoes of his assignor and has the same remedies.

On the other hand, there are well-considered cases in which it is held that in such a case as this the immediate vendee or vendees must be made party to a bill for specific performance by the last vendee against the original vendor.

In McCarthy *vs.* Couch, 37 Minn., 124, A had agreed to sell land to B, and B had agreed to sell it to C. C filed his bill against A and B, to have B required to perform his contract with A, and to have A required to convey to B, and sought to have B then required to comply with his contract

with him, C. A made no objection to this proceeding. Nevertheless, the court held that C had no right to interfere in the contract between A and B, to which he was not a party. Other cases relied upon by the plaintiff's counsel were distinguished thus:

> "These were cases where the court acted upon the parties to specific contracts *or their assigns.*"

In Simms *vs.* Lide, 94 Ga., 553, it was held that where A had agreed to sell to B, and B had resold to C, that *a bill by B to the use of* C for specific performance could be maintained. (The opinion of the court in this case is to be found in the head-note. As explaining this peculiarity in this and numerous other cases in the Georgia reports of that period, see the explanation facing the title page of 88 Ga.)

In Lord *vs.* Underdunk, 1 Sandf. Ch., 48, there was a situation like that which was involved in Willard *vs.* Tayloe, 8 Wall., 557. The bill was filed by a sub-purchaser from the contract-vendee of one hundred acres out of eight hundred acres covered by the first contract. It was held that the fact that the complainant had purchased only a part of the land covered by the contract between the original parties was sufficient to defeat his right to a decree. The court added:

> "When the vendee has transferred his whole interest the court, in a suit by his assignee, *in which the vendee is a party*, will direct the vendor to convey to the assignee. In that case the vendee assents, and it matters not to the vendor to which he shall convey the entirety." (The italics are in the original report.)

The complainant in the above case was a sub-purchaser and not an assignee.

In Ward *vs.* Ledbetter, 1 Dev. & Battle Eq. (N. C.), 496, there had been a contract for the sale of real estate; the purchaser under that contract had paid for the land and had resold it to the complainant, who had also paid the purchase

money. The sub-purchaser in his bill made both his vendor and the original vendor parties defendant, and it was held that he was entitled to a conveyance.

In Hoover *vs.* Donally, 3 Hen. & Mun. (Va.), 316, a sub-purchaser filed his bill for specific performance against the original vendor, and it was held that he was not entitled to proceed because he had not made the intermediate vendee a party to the suit.

Van Meeter *vs.* Williams' Administrators, 1 J. J. Marshall (Ky.), 561, is an excellent case on the point that in cases of this kind all the intermediate parties are necessary parties to the suit.

IV.

The Fourth Assignment of Error.

Involving the question whether the instrument of May 2, 1905, signed by Miss Lenman, was such an agreement as is enforceable in equity notwithstanding the Statute of Frauds.

Section 1117 of the Code of this District, which has been in force even since the Code went into effect, on the 1st of January, 1902, provides as follows:

> "No action shall be brought * * * upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, which need not state the consideration, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

It is not deemed necessary to add anything to what has been set forth in reference to the character of the writing signed by Miss Lenman on May 2, which it is the object of this suit to enforce. On its face, laying aside all the oral evi-

dence relating to it, it is a meaningless document. By the aid of oral evidence and in that way only it appears that it was probably intended that Miss Lenman should sign her name where Lampton signed the name of his firm as agents for Fannie E. Wilhoite.

It is submitted that in view of the provisions of section 1117 oral evidence cannot be resorted to for the purpose of explaining the circumstances under which this paper was executed and showing that Miss Lenman intended to bind herself, and not merely to confirm the obligation of Early & Lampton.

In Barry *vs.* Coombe, 1 Pet., 640, 650, a case involving a contract for the sale of real estate and which came to this court from the Circuit Court of the District of Columbia, it was said:

> "A note or memorandum in writing of the agreement, therefore, is sufficient, and there is no question that in order to obtain a specific performance in equity, *the note in writing must be sufficient to maintain an action at law.*"

It would seem to be clear that an action at law by Jones (as assignee of Wilhoite) against the appellant on this instrument could not be maintained. It is absolutely essential to go outside of the paper and introduce oral evidence to show that it was the appellant who received the hundred dollars referred to in it or that it was she who is intended to be the vendor of the real estate described in the paper.

There is some diversity of opinion in the courts of this country as to whether oral evidence can be resorted to on behalf of the plaintiff in suits to reform written contracts, where the agreement is one which the Statute of Frauds requires to be in writing. This subject is discussed in Pomeroy's Equity Jurisprudence in sections 866 and 867 and in the notes to section 867. The learned author of that work concludes that the great weight of authority is in favor of the admissibility of the evidence, and he agrees with that

conclusion:. It is unnecessary, however, to consider these cases and the grounds upon which they are based, because in this case the court is not asked to reform the agreement, and in the second place because this is not a case of mistake in the terms of a written contract, but the entire absence of a contract. If Miss Lenman's signature appeared on this paper where the signature of Early & Lampton, as the agents of Wilhoite, first appears, and one of the lots had been omitted by mistake from the description of the property sold, the question above referred to would arise and the authorities which bear upon it would be pertinent; but this paper on its face presents no agreement at all between Miss Lenman and Wilhoite. Excluding everything but the paper itself, it is a mere acceptance and confirmation by her of an agreement between Wilhoite and her own agents. In a case of that kind the authorities seem to agree that parol evidence is inadmissible when the transaction is one covered by the Statute of Frauds. This distinction is very clearly made in the recent case of Mead *vs.* Winslow, 23 Wash., 638; 23 L. R. A. (N. S.), 1197. In that case, at the foot of a building contract, after the signatures of the builders, appeared the following:

> "In the presence of sureties
> "S. A. WHITE.
> "W. F. BAILEY."

The prayer of the bill was that the words "In the presence of sureties" be reformed so as to read: "Subscribed as sureties for the faithful performance on the part of said J. R. Winslow."

The court held that the bill was properly dismissed, saying:

> "The court will not, under the guise of reforming an instrument, construct or reconstruct the instrument so as to make it comply with the statute."

So, in Osborne *vs.* Phelps, 19 Conn., 63, 70, 72, the case was that in a transaction relating to the sale of real estate two papers were prepared, one to be signed by the vendor and the other by the vendee. By mistake, each signed the other's paper instead of his own. The vendee filed a bill in equity to have the contract reformed in accordance with the intent of the parties, and then to have it specifically performed. It was held that parol evidence was inadmissible to show the mistake and that the bill was properly dismissed. The following is an extract from the opinion of the court:

> "Now, the instrument, which was signed by Osborn, and the only one, as the case shows, which he ever did sign, contains no agreement to convey the land to the plaintiff. Without the aid of parol testimony, it would be very difficult, if not impossible, to say what the parties meant and intended, by that instrument. If not utterly void for uncertainty, it is so very vague and uncertain, that no court of chancery would ever decree any specific execution of a contract proved only by the instrument itself.
>
> "Indeed, this is not claimed by the plaintiff. And the case itself shows that the writing was never made for the purpose of being executed by Osborn; and he signed it, through mistake, for another which he never did sign. The plaintiff thereupon calls upon the court to correct the agreement and make it as the parties intended it should be, and then enforce the execution.
>
> "This was done, by the county court; and for the purpose of ascertaining what the parties intended to do, the court received parol evidence in support of the plaintiff's claim, and decreed the execution of the contract, as established by the aid of that evidence. The enquiry now is, whether that was legally done, and is not in violation of the provisions of our statute.
>
> "This question was very fully considered in a case before Lord Redesdale. Clinan *vs.* Cooke, 1 Scho. & Lef., 22. There a bill was filed, praying for the specific execution of an agreement for a lease of certain lands for three lives. The defendant had caused

an advertisement to be inserted in the public papers that the lands in question were to be let for three lives, or thirty-one years, and directing application to be made to one Meagher. The plaintiffs, in consequence, applied to Meagher, and he made and signed an agreement, which stated that the defendant had demised to the plaintiffs the lands at a certain rent, but omitted to state the term for which they were leased.

"One question was whether that omission could be supplied, either by a reference to the advertisement or by parol evidence. For the plaintiffs, it was contended, that though the agreement, taken singly, might be defective in not expressing the term for which the lease was to be made, yet that deficiency was supplied by a reference to the advertisement, in which the term for three lives, or thirty-one years, was expressed; and Meagher, who subscribed the agreement, was the person referred to, by the defendant himself, in the advertisement.

"But the chancellor held that the omission could not be supplied in either mode; not by a reference to the advertisement, because the agreement contained no such reference, and the two instruments could not be connected together by parol evidence; nor could the omission be supplied by such evidence, because that, in effect, would be to charge a party upon a contract not made in writing and signed by him.

"That case has ever since been considered as a leading one upon this subject; and if the doctrine contained in it is well founded it is decisive of the one under consideration."

* * * * * * *

"It is however insisted, that in this case, there were two instruments, executed by the parties, at the same time, as parts of one transaction, and that they are to be taken together, in determining the contract. If this were done, the uncertainty, without any light from parol testimony, would not be removed. The instrument executed by the plaintiff is as vague and indefinite as the other. But when we let in parol

evidence, and learn from it, that each instrument was executed by the wrong party, the whole difficulty vanishes. So that we are still brought back to the question, whether parol evidence is admissible to show the mistake.

"Again, admitting that both instruments taken together would sufficiently show what the agreement was, still there is the same difficulty in the way. Osborn signed but one of them, and that one contains no reference to the other. We cannot learn from it, that any other existed. How then can it be said, that the writing executed by the plaintiff, was *signed* by Osborn? The case shows, that it was drawn for him to execute, but by mistake, that was not done.

"Suppose the contract had been fully and correctly drawn, and Osborn, by mistake, had never signed it; could it be enforced in the face of the statute? Clearly not. The plaintiff's case might be a hard one, but he would be remediless. And in our judgment, it makes no difference, whether he entirely omitted to sign the agreement, or through mistake signed the wrong one, provided the one he did sign does not show an agreement on his part to convey the land to the plaintiff."

In Lipscomb *vs.* Watrous, 3 App. Cas., D. C., 1-6, specific performance had been sought of a contract which was signed by the vendor, but not by the vendee. The opinion in the case was delivered by Chief Justice Alvey. The instrument sued on was signed by real-estate brokers claiming to represent the vendee. Speaking of that instrument, it is said in the opinion of the court that "the memorandum of agreement upon its face would seem to indicate that it was not a completed instrument at the time it was prepared; that it had been prepared in anticipation of a sale thereafter to be completed." In affirming the decree dismissing the bill it was further said:

"The agreement, as we have seen, does not disclose the names of the owners of the property. Why this omission it is difficult to conjecture. But the

agreement, while it appears to have been the intention that it should be signed by the appellant, the purchaser, was not signed by him; and as that agreement professes to embrace the entire contract, and all the terms and conditions thereof, it is the exclusive evidence by which the parties can be bound if bound at all. *No prior negotiations can be resorted to for the purpose of eking out a binding contract* (Parkhurst *vs.* Van Cortland, 1 John. Ch., 273). And such being the case, as the agreement has not been signed by the appellant as purchaser, in the event of failure of performance on his part, the appellees would be without remedy by way of specific execution of the contract, as against the appellant, except to the extent of the right to insist upon the forfeiture of the small deposit, according to the terms of the agreement. In such case, the familiar principle applies, that a court of equity will never decree a specific performance where the remedy is not mutual, or one party only is bound by the agreement (Lawrenson *vs.* Butler, 1 Sch. & Lefr., 13; Parkhurst *vs.* Van Cortland, 1 John. Ch., 273, 282). It is laid down as settled doctrine by the Supreme Court of the United States, in the case of the Marble Company *vs.* Ripley, 10 Wall., 339, 359, 'that when, from personal incapacity, the nature of the contract or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.'"

V.

It is submitted that for all the foregoing reasons the fifth assignment of error should be sustained and the case returned to the Court of Appeals with instructions to that court to remand it to the Supreme Court of the District of Columbia and direct the latter court to dismiss the bill.

The evidence referred to in the discussion of the first assignment of error makes it clear that Jones, acting for and

in the interest of the trust company of which he was president, having found that it was impossible for that company to acquire the Lenman Building or even that part of it which adjoined the trust company's premises directly, undertook to acquire it by indirection and deception. This deception was practiced not only upon Miss Lenman and her mother, but it was attempted to be practiced upon the court both in filing the bill and in introducing testimony in support of the bill.

The Court of Appeals intimates, rather than holds, that notwithstanding this Jones might succeed in this suit upon the ground that Lampton was his agent in the whole transaction (155). That is to say, that court suggests that where an owner of land is induced to agree to sell it by a misrepresentation as to who is the purchaser, and a bill is filed continuing the misrepresentation and witnesses are introduced in support of the misstatements in the bill, and when the truth comes out in the taking of testimony, the court will enforce the agreement just as though no misrepresentation had been made and the bill had been based upon the real facts in the case. The appellant is unwilling to admit that this is in accordance with the methods of courts of equity until this court shall have had an opportunity to pass upon the question.

It is true that as a general rule where two courts below have decided questions of fact in the same way this court will adopt their conclusion. But that rule has many exceptions. Two of them are cases which came to this court from the District of Columbia—Beyer *vs.* Le Fevre, 186 U. S., 119, and Darlington *vs.* Turner, 202 U. S., 220. In the first of these cases it had been decided by a jury, by a justice of the Supreme Court of the District of Columbia, and by the Court of Appeals of the District that the evidence established a case of undue influence in procuring the execution of a will, but this court held that after having carefully examined the record it was constrained to the conclusion that there was no testimony which justified setting the will aside. In Darlington *vs.* Turner the auditor of the

Supreme Court of the District, a justice of that court and the Court of Appeals had held that the evidence established a case of conspiracy and fraud in a certain settlement made with the representative of minor children, yet this court upon examination of the evidence reversed the decree below because it found that the finding of fraud rested on the uncorroborated evidence of an interested witness who had been so discredited by other evidence that it had been found impossible to accept his testimony as establishing the alleged fraud.

In this case there is very little controversy as to what actually took place in regard to the proposed purchase of the Lenman Building from the time Hoover called upon Edmonston at his office shortly before May 2, 1905, until Hoover and Jones appeared at Edmonston's office with $50,000 borrowed from the trust company for the purpose of making the tender. The real question in the case so far as the facts are concerned is what is the proper inference from the established facts.

A. S. WORTHINGTON,
Attorney for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 19.

ISOBEL H. LENMAN, *Appellant*,

vs.

THOMAS R. JONES, *Appellee*.

BRIEF FOR APPELLEE.

STATEMENT.

The late John T. Lenman died intestate, seized, among other property, of lots 4, 5, 6, and 7, in square 222, in the city of Washington, improved by four store properties fronting on New York Avenue, with a considerable number of offices in the upper stories, the said improvement being known as the LENMAN BUILDING. He left him surviving

his widow, Jeannette R. Lenman, since deceased, and as his only heir at law the appellant, Isobel H. Lenman.

Several weeks prior to May 2, 1905, James J. Lampton, of the firm of Early and Lampton, real estate dealers, approached the appellee through her agent, Louis K. Peak (Rec., 44-5, 58, 71-2), originally for an exchange of the Lenman Building for certain properties belonging to Stilson Hutchins, which overture was declined by the appellee, and was followed by several successive money offers for the Lenman Building, all of which were communicated through Mr. Peak (Rec., 11, 20, 36, 56, 73). At an interview between Mr. Peak, the appellant, and her mother, the former submitted a proposition of Mr. Lampton to give $180,000 for the Lenman Building, to which according to Mr. Peak's testimony Mrs. Lenman answered that she would accept $200,000 net; and, after some discussion between the three of them as to the length of time to be allowed for closing the sale if this offer were accepted, twenty-eight days was fixed upon as the time to be allowed for consummation. According to the testimony of the appellant and her mother, the statement of the latter was that she would not accept less than $200,000 net; while Mr. Peak testifies, upon both direct and cross-examination, that according to his best recollection her statement was that she would take $200,000 net (Rec., 20, 21, 23, 26). He reported to Mr. Lampton that Miss Lenman would sell the property for $200,000, net, whereupon Mr. Lampton agreed to pay $200,000 and to allow Mr. Peak a commission of $1,500, so that the $200,000 would be net to the appellant, in accordance with her proposition. It is undisputed in the testimony that the fact of this commission allowance was fully stated to the appellant and understood by her, before she executed the written agreement of sale, which followed (Rec., 30, 36, 58).

In view of the reference to Mr. Peak in the opposing brief (see p. 11), it may be well to point out his relation to the parties. He was Secretary of the Corcoran Fire Insurance Company, having been connected with it since 1882, Mr. Lenman being then its President, since whose death he had assisted Mrs. Lenman and Miss Lenman in their business affairs, attending to investments of their money (Rec., 19-20), a number of them, during a period extending back ten years or more, being made through Mr. Lampton (Rec., 30, 31). Mr. Lampton came to him in this matter because of his knowledge that Mr. Peak attended to some of Miss Lenman's business (Rec., 22), and because Lampton knew him to be her financial representative (p. 36). When the controversy arose, he declined to give any information to the appellee's attorneys except under subpoena (Rec., 29), though talking freely with Miss Lenman and her attorney without a subpoena—"it was not the $1,500 I was working for. It was merely as a friend," and he was himself "much worried" (Rec., 28-29). When the contract of sale had been prepared, he advised Miss Lenman to go to Mr. Edmonston, her attorney, and consult with him in reference to the matter before signing it (Rec., pp. 27, 28). Miss Lenman testifies that Mr. Peak "did not wish me to act entirely upon his advice in the matter, or rather did not wish us to act entirely upon his advice, and that he would like me to see Mr. Edmonston," to which she replied: "Why, Mr. Peak, I would not have entered into such an agreement without consulting Mr. Edmonston" (Rec., 56). The criticism, at p. 11 of the opposing brief, of his manner of stating Mrs. Lenman's representation, that she "'kind of said' she would take $200,000," disappears on reading the succeeding question and answer, at p. 21 of the Record, and his reply to the attempt of appellant's counsel to weaken that statement, at p. 23. In short, the

Record shows that, throughout the transaction, from the beginning of the negotiations to the time when he left the stand as a witness in the cause, he acted as the agent, representative and friend of the appellant, and not as the instigated instrument of Mr. Lampton, as the opposing brief seeks to contend. And see the testimony of Mrs. Lenman, at p. 52.

When the agreement had been arrived at, Mr. Lampton prepared, and Mr. Peak delivered to the appellant, a written memorandum or form of contract. In delivering it to her, some discussion took place between Mr. Peak and herself over the advisability of the sale, he pointing out to her that interest on the proposed purchase price would exceed the rental revenue derived from the property, but, as stated, recommended that she confer with her attorney, Mr. Wm. E. Edmonston, before acting finally in the matter, to which she replied that she would not, in any event, close it without consulting Mr. Edmonston; and she accordingly called at the office of the latter and consulted with him in regard to it (Rec., 27, 28, 70). At the interview, he called her attention to the fact that the proposed agreement, then unexecuted, called for a deposit of only $100, which he stated was a small sum in proportion to the amount she was to receive for the property, to which she replied that she knew that, but that she "felt in honor bound, not having made any objection to such a sale, to stand by my word," to which he replied, "Well, if that is the case, then it is all right" (Rec., 57). She repeated to him the arguments Mr. Peak had submitted to her in favor of the sale (Rec., 70). He mentioned to her, at that interview, that Mr. Hoover, an officer of the National Savings and Trust Company, which owned the adjoining property, had inquired of him a few days before whether she would sell the Lenman Building. What else occurred between

them is not fully disclosed in the Record, but that the conference was a protracted one is shown by the fact that it occupied from three to four hours (Rec., 30), less an hour or an hour and a half of which she spent in waiting for Mr. Edmonston to return to his office, upon her arrival there (Rec., 57).

At pp. 12-14 of the brief of appellant, some attempt is made to minimize the legal effect of the fact that the appellee was advised to confer with her counsel, and did so, before entering into the contract, by testimony, over objection (Rec., 61) to a conversation between Miss Lenman and Mr. Edmonston, in the presence of a Mr. Coumbe, *post litem motam*, in which she professed, in effect, to have gone to him for advice without receiving any, and testified to an alleged declaration by him that he "didn't want to butt in." This conversation having taken place, if at all, out of the presence of the appellee, the incompetency of the testimony, which was duly objected to (Rec., 61, 88), is too apparent to have escaped the attention of the learned counsel for the appellant; while the failure to prove the absence of that professional advice which the appellee went to Mr. Edmonston's office to receive, without which she told Mr. Peak she would not enter into the arrangement, and which could readily have been proved, if true, by Mr. Edmonston whom she called as a witness on her behalf, cannot be robbed of its legal significance by the statement (Appellant's Brief, p. 13) that "Edmonston was not asked any questions as to this interview by counsel on either side, so that there was not a particle of evidence in the case that Miss Lenman received any advice whatever from him in the matter, except the suggestion that $100 was a small deposit on a two hundred thousand dollar transaction." It was for the appellant to prove, if she claimed it to be the fact and could have done

so, that, although she went to Mr. Edmonston's office for his advice as her counsel, and although she had declared she would not enter into the arrangement without that advice, she nevertheless failed to get it, changed her mind, and made the arrangement without it.

The failure to call an accessible witness to prove a fact relied upon in defense, justifies the presumption that the witness, if called, would not have borne out the defense. United States vs. Carter, 217 U. S., 286, 316-17; Graver vs. United States, 150 U. S., 118, 120-1; Runkle vs. Burnham, 153 U. S., 216, 225; United States vs. Teschmaker, 22 How., 392, 405; Am. Bell Tel. Co. vs. Natl. Tel. Co., 109 Fed. Rep., 1018; *In re* Kellogg, 7 Am. Bank. Reg., 635. The rule is of familiar application in the local courts. Waggaman vs. Earle, 25 App. D. C., 5889.

In Runkle vs. Burnham, as here, the available witness was actually produced, to testify upon other points; but, as the opinion notes, the testimony adduced "seemed seduously to avoid" the question which it could have illuminated.

At the termination of her interview with Mr. Edmonston, appellant returned to the office of Mr. Peak, where she found Mr. Lampton awaiting her, who, however, withdrew, leaving her and Mr. Peak together for such further conference as they might desire (Rec., 58). When he was called back, appellant said to him, "I presume you want this contract" (Rec., 36); the matter of the Peak $1,500 commission was mentioned, whereupon she stated that she understood it (Rec., 36). She then signed the contract, after which Mr. Lampton signed it (Rec., 24), folded it up and put it in his pocket (Rec., 58).

Several days before the transaction was closed, Mr. Lampton had asked the advice of the appellee, who was the President of the National Savings and Trust Company,

and which company owned and occupied the immediately adjacent property, as to the value of the Lenman Building, and had been told by him that in his opinion it would be a good purchase at from $175,000 to $200,000, and had added a request that, if Mr. Lampton secured the property within those figures, he would let appellee, Jones, know before he made any disposition of it (Rec., 38). On the day following the closing of the negotiation with appellant, Mr. Lampton accordingly had a conference with the appellee, which resulted in sale by Mrs. Wilhoite to him, at an advance of $10,000, and a commission allowance of $3,250.00 in addition (Rec., 38, 42).

Three days after the contract of May 2, the appellant called on Mr. Jones, introduced herself as "Miss Lenman, your next-door neighbor, the owner of the adjoining property" (Rec., 141), notwithstanding her attempted denial in the lower courts that she was the owner, inquired, "Are you the ultimate purchaser of the Lenman Building?" learned from him that he was, inquired as to the price he was to pay, and stated the price she had agreed to receive (Rec., 62), giving no notice or intention that there was any purpose not to carry out the contract.

On or about the 22d of May, 1905, twenty days after entering into the contract and seventeen after her interview with the appellee, at which she led him to believe that she proposed to perform her contract, without objection, the appellant notified the appellee that she was "unable to deliver a good and unencumbered title to the property *as she had expected to do,*" and that *"any deed made by her would be subject to the claims and rights of her mother,"* the latter simultaneously giving notice that she would not consent to any sale of the property, or join in any deed of conveyance thereof (Rec., p. 13). This claim of the appellant, namely, that she was

"unable to deliver a good and unencumbered title to the property, as she had expected to do," and that "any deed made by her would be subject to the claims and rights of her mother, were the only grounds upon which she based her refusal to carry out her contract until after the bill for specific performance had been filed, if we except certain other, evidently evasive grounds set up at the time of tender, and not subsequently insisted upon or referred to (Rec., 48). At the time of his purchase, neither the appellee nor those under whom he claimed had had either knowledge or notice that the appellant was not the sole owner of the property; but, desiring the property for a special purpose, he notified the appellant, in reply, that he would accept a conveyance from her without the joinder in it of her mother, and without holding her responsible for the dower interests of the latter; and, on May 25th, within the twenty-eight days allowed by her contract of May 2d, he made the tender described in the testimony at pages 48-9 of the Record, represented in part by Exhibits B, C and D (Rec., 6-10).

The agreement of May 2, 1905, executed in the manner and under the circumstances above stated, was the following:

> WASHINGTON, D. C., May 2, 1905.
>
> "Received of Fannie E. Wilhoite, a deposit of One Hundred ($100.00) Dollars, to be applied to part payment of purchase of sub-lots 4, 5, 6 and 7, Square 222, known as the Lenman Building, sold her for Two hundred thousand dollars net, on the following terms: $50,000.00 cash, balance of $150,000.00 to be secured by deed of trust, payable in three years with interest at the rate of four and one-half per centum per annum on the property sold. Property sold as a good title, or deposit to be returned and sale declared off. Seller and her agents assume no responsibility for cost of

Abstract, should title upon examination prove defective, nor for any damages by reason of said title proving defective. All taxes, interest, rents and insurance to be paid to date of delivery of deed. Purchaser is required, and agrees, to make full settlement, in accordance with terms of sale, within twenty-eight days from this date.

"Seller to give the usual Special Warranty Deed. Conveyancing at Purchaser's cost.

EARLY AND LAMPTON,
Agents for Fannie E. Wilhoite.

"Confirmed, ratified and approved:
ISOBEL H. LENMAN (Owner),
FANNIE E. WILHOITE,
FANNIE E. WILHOITE (Purchaser),
Per E. & L."

As shown by the testimony of Mr. Lampton, Fannie E. Wilhoite was a client of the firm of Early and Lampton, whose name, with her consent, was used in the agreement for the purchase of the property (Rec., 37). She was acting for the firm of Early and Lampton, it being customary in the business of real estate dealers, in buying property on their own account, to vest the title in an outside name (p. 42). The contract was made with the expectation that Early and Lampton would be the purchasers, and Mr. Early, who was easily able to do so, had agreed to raise the $50,000.00 cash payment (p. 43). On May 25, 1905, the $50,000.00 was tendered in United States legal tender notes (Rec., 48), together with the promissory note of Fannie E. Wilhoite, secured by deed of trust upon the property sold, in exact accordance, in all respects, with the terms of the contract of May 2d. Mrs. Wilhoite being, also, a party to the conveyance to the appellee tendered the appellant for execution, already executed by Mrs. Wilhoite in evidence of the fact, recited in it, that she had

assigned her interest in the purchase to the appellee (Rec., 6-7).

The tender having been declined, and the appellant having given notice that she would execute no conveyance which did not recognize a life interest in the property in her mother, a suit for specific performance was instituted by the appellee, resulting in a decree in his favor (Rec., 142), affirmed by the Court of Appeals, from which decree of affirmance the present appeal is prayed.

At p. 27 of the Record, it is objected that, although Mrs. Wilhoite signed the deed tendered to the appellant for execution in evidence of the fact (Rec., pp. 6-7) that she had "assigned her said purchase and all her interest in and to said land and premises unto Thomas R. Jones," yet that she "did not even acknowledge it, the notary's certificate appended to the paper being in blank and unsigned. It is apparent, therefore, that this instrument had no effect. It is neither averred nor proved that, in its incomplete condition, it was delivered or was intended to be delivered to Jones."

That, as between the parties, deeds do not require record; that, as to the parties or third persons having notice of them, unrecorded deeds as are effective as those which have been recorded, and that the only object of record is to affect, by constructive notice, third persons without actual notice, is so elementary that the first of these objections can only be attributed to inadvertence on the part of the learned counsel for the appellant. As to the second of them, the Record shows that the deed in question, thus executed by Mrs. Wilhoite, was in the possession of appellee's counsel, which is the equivalent of being in his own hands, and that it was delivered by him to Mr. Edmonston, attorney for the appellant (Rec., 48), which facts, it is submitted, are a sufficient answer, especially in view of

the further fact that Mrs. Wilhoite was there present, acquiescing in the statements of the counsel of Mr. Jones in regard to her connection with the deed, and offering to re-cast the papers and make the transaction with the appellant exclusively one between herself and Mrs. Wilhoite, which offer, also, the appellant declined.

POINTS AND AUTHORITIES.

The appellant's assignments of error, in this Court, are the following:

"1. In not holding that the conduct of the appellee, Thomas R. Jones, and those under whom he claims, before and after the execution of the alleged contract of May 2, 1905, signed 'Early & Lampton, agents for Fannie E. Wilhoite,' precluded him from obtaining in equity the relief afforded him by the decree which is the subject of this appeal.

"2. In holding that, notwithstanding the fact that the appellee, Thomas R. Jones, by his original bill in this case, sought to enforce the specific performance of the alleged contract sued on solely as assignee of Fannie E. Wilhoite of her rights under the alleged contract with her of May 2d, he was entitled to a decree, although it appeared that instead of being such assignee he had agreed to purchase the property from her (or from Early & Lampton) on terms of sale entirely different from those embraced in the alleged contract between appellant and Fannie E. Wilhoite.

"3. In holding that as such sub-purchaser the appellee had a right to maintain his suit, although he had not made the original purchaser, Fannie E. Wilhoite, a party to his bill and did not show or even aver that he, as a purchaser from her, was entitled to demand from her a deed conveying the Lenman Building to him.

"4. In holding that the instrument of May 2, 1905, signed by Miss Lenman, is such an agreement as is

enforceable in equity, notwithstanding the statute of frauds.

"5. In not reversing the decree of the Supreme Court of the District of Columbia and remanding the case to that Court with instructions to dismiss the bill as to this appellant."

Of these the fifth is too general to be considered. Deitsch vs. Wiggins, 15 Wall., 539; Lucas vs. Brooks, 18 Wall., 436; Stevens vs. Gladding, 19 How., 64.

The rule is the same in the Court below. District of Columbia vs. Robinson, 14 App. D. C., 539-40; Clerks' Investment Co. vs. Sydnor, 19 App. D. C., 89; Andrews vs. Haller Wall Paper Co., 32 App. D. C., 395; Walker Furniture Co. vs. Dyson, *Ib.*, p. 92.

The same rule prevails throughout the States. Encyc. of Pl. & Pr., Vol. 2, p. 942 and citations.

Of the remaining assignments of error, the third should properly be disregarded because the objection there set forth was not made in the pleadings (Rec., 10-15), presented in the Court of first instance (159), or contained in the assignments of error in the Court of Appeals (152).

> "An assignment of errors cannot be availed of to import questions into a cause which the Record does not show were raised and passed on in the Court below." Missouri Pacific Railway vs. Fitzgerald, 160 U. S., 556, 575; Chicago Ry. Co. vs. McGuire, 196 U. S., 128, 131-2.

It is only by treating the enumeration by the Court of Appeals, in its opinion, of the assignments of error in that Court, that the Record in the cause can be treated as presenting any assignments of error here as required by law. Columbia Heights Realty Co. vs. Rudolph, 217 U. S., 547, 551; Briscoe vs. Rudolph, October Term, 1910.

The fourth assignment of error, also, must necessarily be disregarded because the objection presented by it is not only omitted from both the pleadings and the assignments of error in the lower court, but because the contract of sale, set up in the bill for specific performance, is fully admitted in the answer.

Without waiving these objections to the assignments of error, or to any of them, they will be considered in the order of their enumeration in the brief.

I.

The first assignment is that the Court below erred,

> "In not holding that the conduct of the appellee, Thomas R. Jones, and those under whom he claims, before and after the execution of the alleged contract of May 2, 1905, signed 'Early & Lampton, agents for Fannie E. Wilhoite,' precluded him from obtaining in equity the relief afforded him by the decree which is the subject of this appeal."

With the authorities cited at pp. 7-9 of appellant's brief under this heading, to the effect that specific performance lies in the sound discretion of courts of equity, and that it will not be granted in aid of unconscionable, oppressive, unfair, unreasonable or mistaken contracts, or such as are hard and unconscionable, against public policy, illegal or immoral, and the like, the appellee has no controversy. No one of these conditions is presented in the case at bar. It falls under a different rule, namely: the rule that, in the absence of such special conditions as those indicated, relief of this description is practically a matter of right. It is only where the claim of the complainant under a legal, valid contract is met by some valid, opposing equity that the Court's discretion is called into existence. Where the

contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions and is capable of being enforced without hardship to the other party,

> "it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to award a judgment of damages for its breach." Pom. Eq. Jur., 3d Ed., Sec. 1404; King vs. Hamilton, 4 Pet., 328.

> "The relief lies in the discretion of the Court so far, and only so far, that it must necessarily judge whether, under the circumstances of the case, the contract is or is not an equitable one. That being determined, judicial discretion ceases." Goodwin vs. Collins, 4 Houst., 28.

> "If a contract respecting real property be in writing, is certain, valid in all its parts, for adequate consideration, and capable of being performed, it is as much a matter of course for a court of equity to decree specific performance of it as for a court of law to give damages for the breach of it." Poplin vs. Foley, 61 Md., 281.

> "The jurisdiction of courts of equity to decree specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach." Union Pac. Ry. Co. vs. Chicago, etc., Ry. Co., 163 U. S., 564, 600.

It is further to be noted that judicial discretion in the form of enforcing specific performance under the facts and

circumstances shown by the Record in this case, has already been exercised both by the Supreme Court of the District of Columbia and by the Court of Appeals of that District. Under the rule governing appeals from the exercise of discretion by the lower courts, reversal can be contended for, and will be granted, only where the appellate court finds an abuse of discretion.

In the present case, it can not be successfully or reasonably disputed that the contract complies with all the requisites to enforcible, legal validity. It is in writing, is certain in its terms, is for a valuable consideration, the sufficiency of which is not only undisputed but is expressly declared by defendant's counsel, on the Record, not to be in question under the issues in the case (Rec., 93), following the interviewing of sundry parties by appellant's witness Coumbe for the purpose of ascertaining how the contract price in the present sale compared with the values of other properties in that vicinity. It is fair and just in all its provisions, and is capable of being enforced without loss or hardship, legal or otherwise, to either party.

At pages 45-7, two authorities are cited in support of a contention on behalf of the appellant that there is an absence of privity between the vendor in an agreement for sale of lands and the vendee or assignee of his vendee, precluding the latter from maintaining a suit for specific performance. In the first of them, Doyle vs. Birdsell, 112 N. W. Rep., 855, the complainant does not appear to have been either an assignee or a vendee of the original purchaser, but simply a party to whom the original vendee had asked the deed to be made, and who had been the grantee in an undelivered deed—"Kelly (the vendee under the agreement of sale) did not state that he had procured a purchaser, that he had sold the land, or that anyone had agreed to buy

it." Under these conditions of fact, the case seems without application.

Stratton vs. California Land Company, 86 Cal., 353, the other authority referred to, is quoted as holding that the original vendee under such a contract for sale can not, by making a re-sale to a third party, create such a privity between such vendee and his own vendor as will entitle the former to maintain an action against the latter, the second transaction being designated as a "sub-contract," and it being held that nothing less than an assignment of the original contract will create such relation between the original vendor and the vendee's purchaser as will enable the latter to sue.

Since Stratton vs. Cal. Land Co. concedes that, if the original contract of sale had been assigned, the assignee could maintain the suit, and since there is no dispute in the evidence as to such assignment in the present case, the citation is not authority for interference with the decree below. On May 25, 1905, which was five days within the time for performance limited by the contract, the appellee presented to the appellant for execution the deed of May 25th, 1907, set forth at pages 6-7 of the Record, which recites, in terms, that the said "Fannie E. Wilhoite has assigned her said purchase, and all her interest in and to said land and premises, to Thomas R. Jones, in evidence of which assignment the said Fannie E. Wilhoite has become a party to and executes these presents," the deed in question having been executed by her before it was tendered to appellant for execution, and she being present at the tender in confirmation of this recital, and for the purpose of effectuating the transaction by executing the papers there tendered, or any other deeds or papers which might be more satisfactory to appellant in consummating the transaction (Rec., 48).

Even if the original transaction between Mrs. Wilhoite and the appellant on May 3d was insufficient for the purpose intended, we have here an unmistakable and undisputed assignment, falling strictly within the doctrine of Stratton vs. Cal. Land Co., and presented to the appellant five days before expiration of the time within which she had agreed to convey.

The fact is not overlooked that, at pp. 155-6 of the Record, the Court of Appeals, in its opinion, after holding that the deed of May 25th, above referred to, was "sufficiently executed to be a binding conveyance between Wilhoite and the plaintiff," nevertheless held that it was not to be treated as evidencing the very fact which it recited as the reason, or occasion, of its execution by her, namely: "And whereas the said Fannie E. Wilhoite has assigned her said purchase and all her interest in and to said land and premises unto Thomas R. Jones, in evidence of which assignment the said Fannie E. Wilhoite has become a party to and executes these presents." With the utmost respect for the conclusion of that Court in this regard, it is respectfully submitted that it is erroneous. Even if, for any reason, the original agreement between herself and Jones, dated May 2d but executed May 3d, can be considered as exclusive of any further or subsequent agreement between them in the premises, the recital in the deed of August 25th, which the Court of Appeals refers to the former agreement, is at least a contemporaneous construction of it, between herself and the appellee, conclusive as between themselves; and it is one to which the appellant is without right or standing, in a court of equity or elsewhere, to take exception. The validity or sufficiency of the contract between the vendee in the original contract and his own vendee is a matter between themselves, with which the original vendor has no concern—even if it were merely oral,

the original vendor could not interpose the objection that it should have been in writing under the provisions of the statute of frauds. Currier vs. Howard, 14 Gray, 513; Ewing vs. Gordon, 49 N. H., 444.

But, with respect to Stratton vs. Cal. Land Co., it is further to be noted that it cites no authority whatever in support of the proposition it declares; and, if the transaction between Mrs. Wilhoite and appellant rested upon what the California decision designates as a sub-contract for re-sale, it would still remain to consider how far that decision is in harmony with the otherwise universal current of authority upon the subject.

Specific performance is granted under the principles of equitable conversion (Pom. Eq. Jur., Secs. 368, 372, 1161, 1406).

> "As soon as the contract is finally concluded, although it is wholly executory in form, these rights and estates become fixed and vested. It follows, therefore, that the purchaser, being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership." *Id.*, Sec. 1406; Pelton vs. Ins. Co., 77 N. Y., 606-7; Brewer vs. Herbert, 30 Md., 301, 307, *et seq.*—holding that, if the premises are destroyed by fire before conveyance, the loss is that of the purchaser.
>
> "As the vendee has acquired the full equitable estate —although still wanting the confirmation of the legal title for purposes of security against third persons— he may convey or encumber it; may devise it by will; on his death, intestate, it descends to his heirs and not to his administrators; in this country, his wife is entitled to dower in it; and specific performance is, after his death, enforced by his heirs: in short, all the incidents of a real ownership belong to it. * * * As the vendor's legal estate is held by him on a naked trust for the vendee, this trust, impressed upon the land, fol-

lows it into the hands of other persons who may succeed to his legal title, his heirs and his grantees, who take with notice of the vendee's equitable title. In other words, the vendee's equitable estate avails against the vendor's heirs, devisees and other voluntary assignees, and his grantees with notice." Pom. Eq. Jur., Sec. 368.

"If the entire contract had been assigned to the brother, so that he had become substituted in the place of the complainant, * * * the brother might have filed the bill, and insisted upon being treated as representing the vendee." Willard vs. Tayloe, 8 Wall., 557, 571, an authority repeatedly quoted in the brief for appellant.

"Wherever the specific execution of a contract or covenant respecting lands would have been decreed as between the original parties, it will be decreed as between all persons claiming title under them in privity of estate or of representation or of title, unless controlling equities have intervened: and this without regard to the form or technical character of the contract." 26 Ency., 125-6; Meyer vs. Mitchell, 75 Ala., 475, 480; Worthington vs. Lee, 61 Md., 530-5.

Bissell vs. Hayward, 96 U. S., 580-6, decides that the devisees of the owner of land can maintain a bill for the specific performance of a contract to purchase the same. Why not the converse of this rule? If a volunteer may maintain a bill for such a purpose, why not a purchaser for value?

In Ewing vs. Gordon, 49 N. H., 444, 463, the bill was by an assignee, as in the present case, and the question was fully considered. "The contract was properly assignable. The counsel for the defendant suggests in argument that the defendant may have been willing to pay or convey to Russ, but not to Ewing or anyone else; but no reason for this preference is intimated in the argument or in the evidence; nor has the defendant in his dealings with either

of the plaintiffs given any warrant for such an intimation. The courts of equity act in favor of all persons claiming by assignment under the parties, independent of that privity of contract generally indispensable at law."

To like effect see Hunt vs. Hayt, 10 Col. App., 278, 282; House vs. Dexter, 9 Mich., 246; Robinson vs. Perry, *et al.*, 21 Ga., 183; Fuller vs. Bradley, 160 Ill., 51, 55; Melton vs. Smith, 65 Mo., 315, 320; Pomeroy vs. Fullerton, 113 Mo., 440, 458; Randolph vs. Wheeler, 182 Mo., 145, 155 *et seq.*; Harriman vs. Tyndale, 184 Mass., 534, 539; Story's Eq. Jur., Secs. 783, 1040, 1056-57a.

Such a contract may be assigned for a sufficient consideration, no assignment in writing is necessary to its validity, and the assignee is entitled to maintain an action for its specific performance. Currier vs. Howard, 14 Gray, 513.

In Griffith vs. Stewart, 31 App. D. C., 29, affirmed in 217 U. S., 323, the doctrine is thus stated by the Court of Appeals:

> "We are of the opinion that, as to the particular part of the estate of Ball involving the land in question, the sale effected a conversion, and thereafter Ball held the land as trustee for defendant; that, upon the execution of the contract, Ball's interest, as represented by the unpaid balance of the purchase price, became personalty or a chose in action, and passed to the plaintiff executor as such. * * * Under the sale, the land became the property of defendant, and the agreed purchase price became the property of Ball. In equity, Ball held the land as trustee for defendant, and defendant held the purchase price as trustee for Ball. * * * In the case of Lewis vs. Hawkins, 23 Wall., 119, the Court said: * * * 'Upon the execution of the notes and the title bond between Lewis and Hawkins, Lewis held the legal title as trustee for Haw-

> kins, and Hawkins was a trustee for Lewis as to the purchase money. Hawkins was *cestui que trust* as to the former and Lewis as to the latter. * * * The equitable estate of the vendee is alienable, descendible and devisable in like manner as real estate held by a legal title.' * * * The rule of law applicable where notes and a bond were exchanged to secure ultimate performance will apply with equal force to a contract between the parties for the same purpose. In other words, a contract of sale of land converts the estate of the decedent into personalty, over which the personal representatives have full control."

Unless Stratton vs. California Land Company is to be taken as of greater authority than these decisions by this and the courts everywhere else, in both England and in America, it follows that, when appellant signed and delivered the contract, Mrs. Wilhoite became in equity the owner of the land, subject to the payment of the purchase money, which land she was at liberty to sell as fully as if she held the legal title. It further follows that, if her transaction with the appellee is regarded as a re-sale, simply, the result is that appellee is the owner of the land, and the appellant a mere trustee of the legal title, under a trust to convey it to him upon compliance with the terms of sale between herself and his grantor. Further discussion, it is submitted, cannot be necessary.

Returning to specific consideration of the first assignment of error, the first answer to it is that no such objection is raised in any manner, however remotely, in the pleadings.

The facts referred to in the brief as constituting improper conduct upon the part of appellee and those under whom he claims, sufficient to defeat his right to specific performance, may be summarized as follows:

That appellee had previously endeavored, unsuccessfully, through one Coumbe to purchase the property in controversy, or a part of it, from the appellant and her mother; that, shortly before May 2, 1905, the Vice-President of appellee's Trust Company inquired of Mr. Edmonston whether the Lenman Building was for sale; that Peak, instigated by Lampton, began going to appellant's house, making offers for the property, resulting finally in a statement by Mrs. Lenman, that she would take $200,000, or would not take anything less for it; that Lampton thereupon immediately prepared the agreement sued upon, which Peak took to appellant, and made the suggestion that she consult Edmonston about it, which she proceeded to do; that Mrs. Wilhoite "was a mere dummy"; that Lampton promised Peak $1,500 if the sale went through; that Lampton had requested Peak "to keep it quiet"; that Peak had urged appellee and her mother to make the sale, arguing, among other things, that the net receipts from the property amounted to less than the interest obtainable on the proposed purchase price; that appellant was informed of the fact of Peak's commission at his office, at the time when the contract was signed; that she supposed the instrument of May 2d to be merely an option; that, under the contract with Mrs. Wilhoite, only $50,000 was to be in cash, while the sale by the latter to Jones was to be for all cash, and was to be consummated in five days, instead of within the twenty-eight days specified in the appellant's contract with Mrs. Wilhoite; that appellant was led to believe that Stilson Hutchins was to be the purchaser; that, after sale to appellant, the effort was made to hurry the transaction through within five days; that appellee informed appellant, on May 5th, that he had purchased the building because the Company of which he was President could not hold it, and that he was buying it for the Company, and that

Lampton told appellant at the time she signed her contract that his partner Early knew nothing about the transaction. This summary, we believe, covers every act or fact in connection with the alleged improper conduct of the appellee, Peak, Lampton, or Mrs. Wilhoite, who are the only parties, other than her counsel, Mr. Edmonston, with whom the appellant dealt in the transaction or who she claims were connected with it.

Every one of these facts alleged by her were known to her as fully and completely on May 5th, the date of her interview with the appellee, as at any subsequent time. Practically each of them rests upon her own testimony, as facts which she either personally knew or of which she was informed at or prior to that date. Yet her answer is wholly silent as to each and every of them, or as to any other conduct upon the part of anyone which she claims to be inequitable, or a ground for her refusal to perform her contract. The only defenses set up in her answer are, first, that the property really belonged to her mother, who was unwilling to sell; secondly, that Mrs. Wilhoite had not sold, transferred and assigned all her rights under the agreement of May 2d, but that, on the contrary, the appellee had admitted to appellant, on May 5th, that he had purchased the property from Mrs. Wilhoite for $210,000, under an agreement requiring him to close the sale within five days from May 3d, the date of his purchase, and that, therefore, he was "not an assignee or transferee of the alleged contract of sale, exhibit 'A,' but that the complainant was a purchaser from said Wilhoite, or said Lampton, at the specified sum of $210,000 for the property, and that the time for the completion of his purchase was fixed by his contract with said Wilhoite, or Lampton, at five (5) days"; thirdly, that the complainant was not acting in his own interest, but for the National

Safe Deposit, Savings & Trust Company, the purchase of the property by which Company she alleged was in violation of the law and against public policy, and, fourthly, that, inasmuch as Mrs. Wilhoite had sold to the complainant at an advance of $10,000, that sum would fully compensate her for the appellant's failure to perform the contract, that the appellee could have no better standing than Mrs. Wilhoite, that the appellant was amply able to respond to a judgment for $10,000 or more, and that, therefore, there was an adequate remedy at law.

The first of these defenses, that the property really belonged to appellant's mother, who was unwilling to sell, was the only one set up by her before the suit was filed (Par. 4 of Bill, and of Answer, Rec., 3, 13), and, therefore, under the rule of law applicable in such case, is the only one which she is entitled to set up in the suit. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold." Railway Co. vs. McCarthy, 96 U. S., 258, 267-8; Davis vs. Wakelee, 156 U. S., 680, 690-91, and citations.

The utter groundlessness of this defense was so conclusively demonstrated by the testimony of the appellant herself (Rec., 50, 52, 53-4, 64, 66, 67, 77, 84, 103-4), as well as by that of Mrs. Lenman (pp. 50-51), that, although still contended for in the Supreme Court and in the Court of Appeals of the District of Columbia (Rec., 153-4), it has been entirely abandoned in this Court, being made the subject neither of an assignment of error, nor of a passing reference, even, in the brief filed for appellant here.

If, notwithstanding the absence of any basis therefor in either the original defense of the appellant, or in the

pleadings, we proceed to consider the alleged "conduct" of the appellee and those under whom he claims as relied upon in the brief on her behalf, slight basis for its claims in that regard is to be found in the testimony.

At p. 11 of the brief, Peak is described as having been "instigated by Lampton," as to his connection with the case; the undisputed fact in the testimony being that he had represented Miss Lenman and her mother in her business affairs ever since the death of John T. Lenman, that for ten years or more he had represented appellant in her transactions with Lampton in the investment of her funds, and that Lampton went to him because he knew him to be the financial representative of Miss Lenman. He was understood by Mrs. Lenman to have been actuated by friendship for them and regard for their interests (Rec., 52). It further appears, both by his testimony and that of appellant, that, after Lampton had agreed to purchase the property for $200,000, Peak, although pointing out to her that that price would yield her a better income than the property was bringing, advised her to go to her attorney, Mr. Edmonston, for his advice upon the subject before signing the agreement, which was then in her hands for the purpose of execution.

At p. 14, it is stated that Mrs. Wilhoite was used in the matter as a mere dummy, "so that all the liability save as to the $100 should be on one side." This is to presume ignorance of the law, which holds an undisclosed principal in such matters both capable of enforcing the contract and of having it enforced against him (Salmon Falls Co. vs. Goddard, 14 How., 454-5), and to ignore the undisputed testimony in the case that Early & Lampton intended to consummate the purchase whether or not they found a purchaser, and had already arranged to raise the $50,000 cash payment (Rec., 43).

On the same page, it is stated, absolutely as a fact, that Peak told appellant Lampton did not wish her to say anything about the sale to Coumbe, and that this was done because Lampton feared Coumbe, if he knew what was going on, would suspect the Trust Company of secretly trying to acquire the property—passing over the fact that the alleged statement by Lampton rests only upon hearsay, under objection (Rec., 59), and is specifically denied in the testimony of Lampton (Rec., 39); while the statement of Coumbe, referred to on the same page of the brief, that Lampton informed the latter that Hutchins, the proposed purchaser, was about to go abroad, is, also, contradicted at p. 46. Still on the same page, the circumstance is stated that Lampton requested Peak, in the beginning of the negotiation, to "keep it quiet," without giving any reason for that request, and that Peak complied with this admonition, the brief omitting all reference to the fact that the reason for the request is contained in the Record (38-39), that, at the time of this conversation with Peak, Hutchins was regarded by Peak as the probable purchaser (59), and that Lampton at an early stage of the negotiation was attempting to negotiate an exchange of the property for other property belonging to Hutchins (44), as the appellant herself testifies (58, 71-2).

At p. 15 of the brief, Mr. Peak is represented as having "urged" appellant and her mother to make the sale, this statement being without support in the testimony of any witness, except appellant testifies Mr. Peak pointed out to her the fact, which is undisputed, that the interest on $200,000 would exceed the revenue she was deriving from the property. The charge is almost as baseless as the allegation in the sworn answer (Rec., 12) that "Lampton by persistent urging induced this defendant to sign the aforesaid paper, exhibit 'A,'" the fact being that she met Lamp-

ton but once in the transactions, his conduct on which occasion, as described in her own testimony, gives no semblance or pretense of color for the charge (Rec., 58).

On the same page, it is stated, again as though an undisputed fact, that Miss Lenman was not informed that Peak was expecting compensation from the purchaser until she was at his office when the contract of May 2d was signed; Lampton's testimony, not denied by any witness, being that Peak informed Lampton at the time the contract was being signed that he had spoken to Miss Lenman about the $1,500, and that she replied, "Yes, I understand Mr. Peak is to receive $1,500 from Early & Lampton at the completion of this sale." She nowhere claims, moreover, either in or out of the pleadings, that she was influenced in any degree by Peak in the execution of the contract; she was advised by him not to sign it until she had advised with Edmonston, and she informed him she would not have done so, even without his suggestion.

At p. 17, it is declared that "the greatest pains were taken by Lampton to mislead Miss Lenman as to the real purchaser whom Lampton was supposed to have in mind," the evidence referred to as supporting this claim being Peak's testimony that, at the beginning of the negotiation, something was said about Stilson Hutchins by Lampton, and that Miss Lenman (under objection, p. 57) testified Peak had told her that he understood Hutchins was the purchaser. That the latter representation, even if competently proven, was true at the time that it was made, is pointed out above, though Peak testifies (22) that Lampton did not state whom he represented, nor is there evidence of any "pains," or effort of any kind at concealment on the part of Lampton. Neither Miss Lenman, nor anyone else, inquired of Lampton who his purchaser was. She testifies, at p. 69, that she did not know when the contract was

signed whether he had any purchaser, "only that it had been intimated to me that Mr. Hutchins was the probable purchaser"—whom she preferred not to have the property (72). The testimony of Lampton shows that he had none at the time of closing the contract with Miss Lenman, that the sale to Jones did not take place until the following day, and that there was no negotiation between them looking to a sale beyond the fact that, when he went to Jones to ask his opinion as to the value of the Lenman Building, the latter requested, if he could buy it for from $175,000 to $200,000, that he would communicate with Jones before disposing of it. The appellant claims no basis for her alleged understanding in this regard other than the alleged statement to her by Peak, not made in the presence of any one else concerned in the negotiation, that Hutchins was the "probable purchaser."

At p. 18 of the brief, it is stated that appellee's counsel "with excessive kindness" offered to produce Mr. Hoover, who had taken no part in the negotiation, as a witness in the case, if appellant's counsel wanted him. What really occurred in this connection will be found at p. 141 of the Record, namely: Mr. Jones having testified that no officer or member of the board of directors of the National Savings & Trust Company knew of the purchase before it had been made, that there never was any agreement or understanding with regard to sale of the Lenman Building to the Company, or to its acquisition of it, and that no purpose existed, or had ever existed, on its part to acquire the Lenman Building (Rec., 140-1), counsel for appellant inquired of the witness whether Mr. Hoover, the Second Vice-President and Trust Officer of the Company, was in the city, and had been so continuously. Thereupon, appellee's counsel offered to "produce him if counsel desire, for any purpose, and we will produce any other officers

or directors or employees of the company on notice"—followed by the intimation of no wish or desire for their production (p. 141).

On the same page of the brief, comment is made upon the haste with which consummation of the purchase was attempted by the appellee, apparently overlooking the fact that, at that time, he was compelled by his contract with Mrs. Wilhoite to close the purchase by May 8th. Nor is it pointed out why an early closing, after the appellant's contract had been executed and delivered, should have been in any respect objectionable or injurious to her.

At pp. 19-20, it is stated, "Jones' contract with Wilhoite was to pay the $200,000 all in cash, and there is neither evidence nor averment that any change in that contract was ever made." At p. 39 of the Record, Lampton testifies, "Mr. Jones preferred to pay all cash, and I thought I could arrange with Miss Lenman to accept the entire amount in cash.

> "Q. What happened? Was that arrangement made —all cash?
>
> "A. No; the arrangement was made for the deed of trust as it calls for here, for the $150,000, and Mr. Jones agreed to that."

At p. 21 of the brief, appellee is represented as having admitted that the purchase was really in the interest of the Trust Company; the foundation of this allegation being, only, that the appellee testified that the special purpose for which he made the purchase was in order that the building might not pass into hands unfriendly to his Company, and that it thereby might be prevented, not from acquiring the Lenman Building, but "from getting a part of it to add to our rear line, and thus straighten out to a certain extent our line, and get more space at that point"; adding in the

same connection that the board of directors had taken no action in the matter, and that he had not communicated with any of its officers in reference to protecting the Bank in this way. The part of the lot which was desired by the Company was a practically unimproved space in the rear, of about twenty or twenty-five feet (Rec., 138-9).

On the following page it is stated, also as an unquestioned fact, that Lampton told Miss Lenman at the time of signing the contract that his partner Early did not know anything about the transaction. The statement rests wholly upon the unsupported testimony of Miss Lenman, unattempted to be corroborated by her financial representative and friend Peak who was present at the interview, and is directly denied by Lampton (Rec., 47).

It is not insisted that the license of argument is exceeded in the particulars thus pointed out and others of similar nature contained in the brief. The matter is referred to only in order that the statements as to the facts of the case contained in it may not be regarded as conceded, or established.

At pp. 18 and 19 of appellant's brief, it is argued that appellee's purchase was on behalf of the National Savings & Trust Company, for the reason that, in his conversation with appellant on May 5th, he used the word "we" in reference to the plans and purposes which existed in reference to the property, that he used the same plural pronoun in his testimony, and that he told appellant, "You know the Company could not hold it unless we used it; so I am buying it for the Company."

If appellant's testimony upon this point were of sufficient importance to justify discussion, it will be seen from p. 63 of the Record, and from pp. 75-6, after an adjournment from February 10th to March 2d, had been taken,

during which interval she had reflected over the fact that "somebody made a point about it," how vacillating and uncertain was her recollection whether "I" or "we" was the pronoun used. The word "we" was used, as stated, in the quotation from appellant's testimony at p. 19 of the brief; but if the word was used by the witness in its literal sense, to indicate that there were other persons interested with him in the matter at the time to which his testimony refers, the fact that such plurality referred to appellee's company is a conclusion which counsel preferred to rest upon inference to be made at the hearing rather than upon inquiry of the witness at the time as to his meaning, or upon the further sources of information upon the subject then tendered him. Had the appellee's attention been called to the inference counsel for the appellant was disposed to attach to his use of the word "we," which would have been no more than fair, the fact might have developed that, as in the case of Tayloe vs. Willard, 8 Wall., 557, 571, interests in the property had been granted to others subsequently to the purchase, who were intended by the word "we," and who were neither necessary nor proper parties to the bill. Such an inference, certainly in a court of equity, which does not presume fraud or criminality, would be a more reasonable and natural one, notwithstanding the exigencies of appellant's case, than that a gentleman of high and honorable position, not otherwise assailed, has committed wilful and deliberate perjury. As noted above, he has testified, specifically and unmistakably, that no officer or member of the board of directors had any knowledge of the transaction until after his contract of purchase was made; that no discussion in regard to the purchase had taken place between him and any of the directors or officers before he made it; that, down to the time his testimony was given, which was considerably more than two years after the mak-

ing of the contract, no agreement or understanding had ever been made with regard to the sale of the building to the Company, or to its acquisition of it, and that no purpose existed, or had ever existed, on its part to acquire that property. This was followed, under the circumstances above noted, by the offer to produce for examination, if desired by appellee's counsel, Vice-President Hoover, or any other officers, directors or employees of the Company, on notice to do so, followed by no notice or the expression of any wish for their production. Surely among the officers, directors and employees of one of the largest financial institutions of the National Capital, some could have been indicated whom the learned counsel for the appellant might have accepted as capable of giving truthful, credible testimony.

Under its discussion of the first assignment of error, at pp. 15-16 of appellant's brief, it is claimed that, when she executed the contract, she understood it to be an option and not an absolute contract for a sale; upon which theory it was argued below and is contended here that it could not constitute the basis of a decree for specific performance. To this objection there are numerous answers.

In the first place, no such claim, either of fact or of law, is contained in the pleadings, which circumstance alone, under the principles stated and the authorities collected at pp. 29-31 of the brief for appellant, is conclusive of the objection.

In the second place, the objection, itself, is evidently a belated one. Appellant made no such claim at the time of her visit to appellee on May 5th, three days after she had signed the contract; no such objection was intimated, however remotely, at the time of tender, where her objections were specifically asked, and were as specifically given

by her counsel (Rec., p. 48). Although her counsel, Mr. Edmonston, who had acted for her throughout the negotiation and down to the institution of the suit, was called as a witness on her behalf, no effort was made to have him verify her statement, at p. 57 of the Record, that she said to him on May 2d, when she took the proposed contract, before execution, to him for consultation, "Here is a paper which purports to be an option," etc. Where the appellant probably acquired her technical phraseology in this regard will appear at p. 72 of the Record, where she states that her present counsel asked her mother whether she had had "the option read to her, or what purported to be an option," followed, so immediately as to render the purpose obvious, by the declaration, "I wish to say very distinctly that when I signed that paper I supposed it was an option and not a sale, and that the matter would be referred to my mother eventually before there would be anything done about it"—and this although, in her answer, she makes no such claim, but places her defense upon the ground, wholly unfounded as is now undisputed in the Record, that "Lampton by persistent urging induced this defendant to sign the aforesaid paper, exhibit 'A' without due consideration and without consultation with her mother."

No other witness testifies to any use of the word "option" by her in connection with this transaction until the controversy had arisen. She said to Mr. Lampton on the occasion of signing the paper, "I presume you want this contract" (Rec., 36). Her business agent, Mr. Peak, mentions it, throughout, as a contract, and never in any other way (Rec., 21, 24, 27, 31, 32, 33, 34); while her counsel also repeatedly so designates it (Rec., 25, 27, 40, 41, etc.). It is further to be noted that no such issue is raised by the pleadings. The agreement is not an option, and appellant's answer does not allege that she signed it mistakenly, under

the impression that it was an option. "A party can no more retover upon a case proved but not alleged, than upon a case alleged but not proved." Foster vs. Goddard, 1 Black, pp. 5-18.

Coming to the authorities cited below in this connection, *i. e.*, in connection with the claim that appellant supposed the contract to be an option, the appellee has no quarrel with any decisions which hold that, where one of the parties has signed a contract under a mistake of fact, *e. g.* as, in the case cited in the opposing brief, where by a clerical error he has offered to sell property for £1,250 instead of for £2,250, the price intended—specific performance will not be enforced. In Hopwood vs. McCausland, 120 Iowa, 218, the only other case cited as to this point, it is perfectly clear, as the Court held, that the party seeking to enforce the contract was not bound by it, in which case some of the authorities agree that the parties will be left to their remedies at law. It would be practically destructive of this branch of the equity jurisdiction in all cases if the law were that one of the parties could defeat it simply by claiming that he *thought* the agreement, though a perfect and a complete instrument binding upon both parties, was merely an option. No such authority is cited, and none we are confident can be.

There is no difference between an option and a contract so far as regards the legal liability of the party executing the former; and the only difference in equity is that, since specific performance is a discretionary remedy, courts of equity have held it inequitable to enforce it against one of the parties at the instance of the other who is not, himself, bound by the agreement, the enforcement of which he seeks. In other words, the doctrine of non-enforcement in such cases rests, not upon any freedom from liability upon the part of the defendant, but upon the inability of the

complainant to demand the aid of the Court. What attitude is occupied by one who comes into a court of equity crying, "I knew that I was binding myself to perform, but I *thought* the other party was not bound, and that, therefore, I could refuse performance of the contract I was making?"

If, in the case at bar, Mrs. Wilhoite was not bound to perform, the agreement was an option, and the cases of Jones vs. Holliday, 2 D. C.. App., 279, and Jenkins vs. Locke, 3 D. C., 485, cited below, are applicable. If she was bound, the application of these cases is not apparent. The contract was binding upon, and the appellant could have held, either her, or Messrs. Early and Lampton whom she represented, and extraneous evidence was admissible to show that she was acting as their agent. Salmon Falls Co. vs. Goddard, 14 How., 454-5, *supra.*

The application of Lipscomb vs. Watson, 3 D. C., App., 1, is equally difficult to see. The trouble there was that the agreement did not "disclose the names of the owners of the property," and that, "while it appears to have been the intention that it should be signed by the appellant [the purchaser], it was not signed by him." The agreement in the case at bar is signed "Isobel H. Lenman (Owner)," and "Fannie E. Wilhoite (Purchaser)."

In Calanchini vs. Bransteter, 84 Cal., 249, options are held to be an exception to the general rule that contracts must be mutual to be enforcible in equity, and that the assignee of an option may maintain specific performance. To like effect, see Napier vs. Darlington, 70 Pa. St., 64; House vs. Jackson, 24 Ore., 89; Robinson vs. Perry, 21 Ga., 183; *contra;* Perkins vs. Hedsell, 50 Ill., 216.

It remains to consider, under the first assignment of error, the objection, stated at p. 23 of the brief, that spe-

cific performance should not be decreed because appellant "was entitled to know with whom she was dealing, or at least not to be misled in that regard," taken in connection with the contention that the National Savings & Trust Company, and not Wilhoite, Early & Lampton, or Jones was the real purchaser.

Here, too, the objection encounters the fatal rule, contended for by the learned counsel for the appellant himself, that the *probata* must afford basis for the *allegata*. No such objection is indicated, however remotely, in the pleadings, nor was it assigned as a reason for non-performance, nor referred to in any manner prior to the institution of the suit. The objection stated in the answer is (Rec., 14-15) that the assignment by Wilhoite to the complainant was made to him, and not to his Company, "for the purpose of evading the law, and to enable said Company to buy and hold real estate through him which it could not legally buy or hold in its own name, and that for this reason, as she is advised by counsel, the bill in this case should be dismissed." This is a very different thing from a claim that she was misled as to the identity of the purchaser, to her injury, and that her refusal to convey, or her defense to the relief sought, was based on that ground.

The charge thus made in the answer, like the attempted defense that the property was really that of the mother, is not made the basis of an assignment of error, nor is it in any manner referred to in the brief, and it is accordingly taken to be abandoned.

The only limitation upon the power of trust companies in the District of Columbia to hold real estate is contained in Section 726 of the Code, which, aside from property taken for debt at mortgage sales and the like, restricts to $500,000 in value the amount of real estate which such companies may hold, which limit of value it was not even

attempted to prove would be exceeded by the National Savings & Trust Company even if it should add the Lenman Building to its present holdings.

It only remains to consider, under the first assignment of error, the authorities cited at pp. 23-5 for the proposition that specific performance will not be enforced unless the name or identity of the purchaser is truly disclosed to the vendor.

In Brokerage Company vs. Wharton, 143 Iowa, 61, one Urdangen had represented himself to be the New York Brokerage Company, and the defendants had accepted a contract for the exchange of properties, signed "New York Brokerage Company," in reliance upon the representation of Urdangen that he was that Company. It developed that two other persons constituted the Company, and that his relation to it was only that of manager, nor, in so far as the report of the case shows, was there any evidence that he was authorized to bind the firm. The Court said: "Under the showing made in his testimony, he incurred no liability whatever in the signing of such contract, but simply undertook to bind other persons, who were wholly unknown to the defendants. We think the defendants were entitled to resist specific performance upon this ground, if there were no other."

It is difficult to detect any analogy between that case, and the one now before the Court, in which latter case the contract was signed with the name of Mrs. Wilhoite, by Early & Lampton, her agents, the evidence being undisputed that they were authorized by her to do so, and the contract being, further, signed by her in person (Rec., 37), she subsequently signing the deed tendered to the appellant for execution, in evidence of the fact that she had assigned to the appellee her purchase and all her interest in the land in controversy, which the appellee had sold to her (Rec., pp. 6-7).

In Ellsworth vs. Randall, 78 Iowa, 141, the contract was made, not between the plaintiff and the owner, but between the plaintiff and the owner's agents. The latter had been authorized by the owner to sell the property to one who already held a tax title to it, in departure from which authority, and without the owner's knowledge, they had contracted to sell to a stranger. The Court said: "But it was the right of defendant to select his grantee. Knight vs. Cooley, 34 Iowa, 221. He gave to Lewis and Dodge (the agents) no general authority to sell, but, at most, accepted an offer which he had been induced to believe was made by the tax title owner, and was under no obligation to convey to another." In Knight vs. Cooley, thus referred to, the complainant had written the owner inquiring the price of the property, and the latter answered stating a price which he regarded as "cheap," which correspondence the complainant sought to enforce as a contract of sale. The Court said: "The mere statement of the price at which property is held cannot be understood as an offer to sell. The seller may desire to choose the purchaser, and may not be willing to part with his property to anyone who offers his price."

It is difficult to see what analogy these cases bear to the case at bar. Here, so far from indicating a desire "to choose the purchaser," the appellant knew that she was contracting to sell to Mrs. Wilhoite—"I saw Mrs. Wilhoite's name on the paper" (Rec., 69). Assuming, at the time, according to her testimony, that the purpose was to sell again, she asked that it be not "hawked around," making no stipulation as to the person who should become the ultimate purchaser, nor, when she found it had been sold to Jones, did she make any objection on that score. At the tender (Rec., 49), her objection as to the personality of the grantee, evasive and in bad faith as it was (Rec., 49), was put on the ground, not that the grantee should have been

Hutchins, but that it should have been Wilhoite, followed by refusal to convey to the latter when compliance in that form was tendered her.

Rodliff vs. Dallinger, 141 Mass., 1, is equally remote in application. Plaintiffs had informed one C. that they would not sell goods to him, whereupon he effected a purchase from them stating that he represented undisclosed purchasers who were in good standing and credit with the plaintiffs. Upon its developing that this representation was false, and that C. was, himself, the purchaser, it was held that the plaintiffs might replevin the goods from him, or from his pledgee, upon the ground that one of the supposed parties to the contract of sale was wanting, the plantiffs never having sold to C., and there being in fact no other purchaser. "When one of the formal constituents of a legal transaction is wanting, there is no question of rescission; the transaction is void *ab initio*. * * * The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementston gave him no power to convey a good title to a bona fide purchaser."

In Fox vs. Tabel, 66 Conn., 397, the plaintiff had procured an order from the defendant for a monument, upon the representation that he was the agent of one Hanna, a manufacturer of monuments, when, in fact, he was not Hanna's agent, but undertook, himself, to manufacture and furnish the monument, which the defendant declined to receive. "The reputation of a manufacturer or merchant may give a value to his goods which is quite independent of their actual quality. An order from A. cannot be changed into an order from B., without the buyer's consent."

The inapplicability of these citations to the case at bar is too plain to justify comment.

In Crocket vs. Lee, 7 Wheat., 522, the controversy was between contestants for the same land, one of whom claimed under an older patent, but under a junior entry, the controversy turning upon the question whether the location in one Cameron's certificate, was, or was not, too vague to be supported, the question of its vagueness, however, not having been raised by the pleadings. The Court declared, as stated in the opposing brief: "If the pleadings in the case were to give no notice to the parties, or to the Court, of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires but which necessity imposes on the courts. We cannot dispense with it in this case."

What the Court did, in that case, however, was, not to dismiss the bill, but to remand the cause to the Circuit Court with directions to permit the parties to amend their pleadings. Its reasoning, moreover, is of itself fatal to the present objection. In the case at bar, the bill alleges that Fannie E. Wilhoite sold, transferred and assigned to the appellee all her rights in and under her contract with the appellant (Rec., p. 2); the appellant in her answer (Rec., p. 12) states that she does not admit this, but that the appellee had stated to her that he had purchased the property from Mrs. Wilhoite for $210,000, under a requirement to close the sale within five days from May 3, 1905; wherefore she avers that the complainant "was not an assignee or transferree of the alleged contract of sale, exhibit 'A,' but

that the complainant was a purchaser from said Wilhoite, or from said Lampton, at the special sum of $210,000 for the property, and that the time for the completion of its purchase was fixed by his contract with said Wilhoite, or Lampton, at five (5) days." Upon this state of the pleadings, the appellant argues that the decree should be reversed and the cause dismissed, because the appellee did not amend his bill.

It will be noted, in the first place, that this objection in the pleadings amounted to no more than an effort to convert the allegation in the bill that Mrs. Wilhoite had "sold, transferred and assigned to the plaintiff herein all her rights in and under the aforesaid contract or agreement," into an allegation that she had assigned "the alleged contract of sale, exhibit 'A,'" *i. e.*, merely the paper upon which the contract between the appellant and the appellee was written; and, in the second place, the very answer discloses the fact that, so far from presenting the hardship discussed in Crocket vs. Lee, upon a party given "no notice of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited," resulting in confusion, uncertainty and injustice, the appellant was in possession, to the minutest detail, of the exact form in which the transaction between the appellee and Mrs Wilhoite was taken, and has suffered no one of the hardships or inconveniences upon which the decision turned in Crocket vs. Lee.

Of the other authorities cited upon this point, Sheehy vs. Mandeville was an action at law upon a promissory note described in the declaration as payable on demand, but which was in fact a note payable sixty days after date. In Boone vs. Chiles, 10 Pet., 177, 208-9, the Court below had certified, on the suggestion of the defendant that it had

been used at the hearing, a deed, which had not been pleaded, the answer resting the defense on the existence of an executory contract of purchase, and not having suggested that it rested upon a deed which had consummated the contract by a conveyance of the property in dispute. "There is no one subject of equity cognizance on which there is a wider difference between a deed and a contract of purchase, than in the one now under consideration. A purchaser with notice may protect himself under a purchaser by deed without notice, but can not do it by purchase from one who holds or claims by contract only. The cases are wholly distinct. In the former, the purchaser with notice is protected; in the latter, he has no standing in equity, for an obvious reason—that the plaintiffs' elder equity shall prevail, unless the defendant can shelter himself under the legal title acquired by one whose conscience was not affected with fraud or notice, and who can impart his immunity to a guilty purchaser, as the representative of his legal rights fairly acquired by deed, in such a manner as exempts him from the jurisdiction of a court of equity," etc.

In Eyre vs. Potter, 15 How., 42, 56, the bill having sought relief on the ground of "actual, positive fraud," it was held that the claim could not be shifted to one of constructive fraud. "Although cases of constructive fraud are equally cognizable by a court of equity with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated," etc.

If, in the case at bar, an assignment of the *paper*, "exhibit 'A,'" would be met by way of defense in a different manner from a sale, transfer and assignment of Mrs. Wilhoite's rights under it, and if it be true, as objected, that the bill alleged the former and not the latter, then, but not otherwise, can the case of Boone vs. Chiles be regarded as furnishing some support.

In Washington Railroad vs. Bradleys, 10 Wall., 299, the lower court, upon a petition by "way of cross bill," which made nobody defendant, which prayed for no process, and under which no process was issued, had decreed relief the reverse of that which the original bill had prayed, which was held to be fatally erroneous, on the ground that, the petition being a mere nullity, there was no pleading before the Court upon which the decree could be supported. Can it be claimed that such a decision, upon such a case, affords the slightest support to an objection like the present?

In Rubber Co. vs. Goodyear, 9 Wall., 788, 793, the attempt was made to attack the validity of a patent on the ground that merchantable goods could not be made according to the directions contained in the specifications. The Court said: "The answer contains no averment upon the subject. No such issue was tendered to the complainants, and they have had no notice that such a defence was intended to be relied upon. In equity, the proofs and allegations must correspond. The examination of the case by the Court is confined to the issues made by the pleadings. Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them."

While not applicable for the purpose for which appellant cites it, Rubber Company vs. Goodyear is fatal to the contentions with which the brief for her abounds and for which no basis is offered by her answer, a number of which have

been pointed out under the discussion of this first assignment of error, and others will be noted later.

In Wilson vs. Haley Live Stock Company, 153 U. S., 39, 47, the cause of action pleaded was not proven, "not merely in some particular, but in its entire scope and meaning," and the case was held to be regarded, not as a case of variance, but as an entire failure of proof. The cause of action pleaded was *de bonis asportatis*, while the recovery was for money had and received (pp. 46-7).

In Southern Railway Company vs. King, 217 U. S., 524, 536, the question presented was whether the Court erred in excluding from the testimony facts alleged in an answer to which a demurrer had been sustained, and which allegations were, therefore, out of the case.

The remaining assignments of error must be more briefly considered:

II.

The second is, in effect (a), that appellee in his bill claims solely under an assignment alleged to have been made by Fannie E. Wilhoite to him on May 3, 1905, while the proof shows him to be, not an assignee of, but a mere purchaser from Mrs. Wilhoite; and (b) that his purchase was "upon terms of sale differing in every respect from the terms of her contract with Miss Lenman." It is added that he had "early notice that his right to sue as assignee was controverted," with consequent opportunity for application to amend, this early notice consisting of the denial that he was assignee of "exhibit 'A,'" contained in paragraph three of the answer (Rec., p. 12).

Even under the particularity of pleading and construction thus insisted upon, it would be incompetent to restrict appellee's claims to May 2, 1905, that date being given un-

der a *videlicet*. The proof shows that no negotiation whatever took place between Jones and Mrs. Wilhoite on or prior to May 2d. The allegation of the bill is, not, as is contended, that Mrs. Wilhoite assigned to appellant *the paper writing*, bearing date May 2, between herself and the appellant, but that Mrs. Wilhoite "*sold, transferred* and *assigned* to complainant herein *all her rights in and under the aforesaid contract or agreement.*" The preliminary contract or memorandum of sale between them (Rec., 145) is identical in form with the memorandum of May 2, executed by appellant, and necessarily carried with it all the rights, and precisely the rights, which vested in Mrs. Wilhoite under the latter instrument. The deed, appellant's refusal to execute which is the ground of the present suit, was on May 25, when tender was made, already executed under seal by Mrs. Wilhoite, and recited that she had "assigned her said purchase and all her interest in and to said land and premises under Thomas R. Jones, in evidence of which assignment the said Fannie E. Wilhoite has become a party to and executes these presents."

At the tender, on which occasion Mrs. Wilhoite was present in the endeavor to consummate the transaction in accordance with her agreement with both the appellant and appellee, counsel for the latter stated, in her presence and with her acquiescence, to appellant and her counsel that the deed had been executed by Mrs. Wilhoite "as evidence of the fact that she had transferred the contract to Mr. Jones." The denial in the answer goes to no one of these facts; but is, simply, that the complainant was "not an assignee or transferree *of the alleged contract of sale, exhibit "A"*—*i. e.*, that she was not the assignee of the mere paper writing of May 2, 1905, which the appellant had executed—an assignment which had not been alleged.

An attempt to restrict in this way the controversy be-

tween the parties set out in the bill, if it would be discourteous to characterize it as mere quibble, is, it is submitted, at least an attempt at extremely narrow special pleading.

"The rule that the proof and pleading must correspond is a familiar one; but it is to be applied equitably, and not rigidly." Crawford vs. Moore, 28 Fed., 824, 827, affirmed in 130 U. S., 122.

"While, however, the rule is as has been stated, under the liberal spirit which inclines courts of equity to get over *form* in favor of *substance*, relief will not be denied unless the facts stated and the case proved are so materially variant as to prevent a decree in favor of the plaintiff."

Campbell vs. Bowles, 30 Grat., 656.

"The appellee was entitled to the same relief against the appellant if the assignment to her was procured by R. F. Pickert [as was proved] and taken by her to defraud these creditors, that it would have been entitled to if the assignment had been procured by Bartholomew Pickert [as was alleged] and had been taken by her for this purpose. * * * Since she [the defendant] was not surprised, misled, or deprived of a full opportunity to rebut the evidence relative to the man or means which procured it, but presented her evidence and tried that issue on the merits, without taking any exception to the introduction of the testimony which presented it, there cannot be said to be any such variance between the *allegata* and *probata* in this case as will warrant a reversal of the decree. Where the ultimate facts which warrant the decree are clearly alleged in the bill, a variance between the evidential facts alleged and those proved, which has not misled or surprised the appellant, nor prevented a fair trial of the issue presented by the proof, is not fatal to the decree, and will not require its reversal." Burt vs. Gotzien et al., 102 Fed., 944.

No variance is deemed to be material unless it be of a character to mislead the opposing party in maintaining his action of defense on the merits. Nash vs. Town, 5 Wall., 689; Grayson vs. Lynch, 163 U. S., 476; B. & P. R. R. Co. vs. Cumberland, 176 U. S., 238.

In the present case, however, as above pointed out, there is no variance at all between the allegations of the bill and the facts proved.

In the second place, under the first of the above objections under the second assignment of error, we submit that there is no such distinction in equity as that between an assignment and a "sub-purchase."

As noted above, it was contended in the court below, solely upon the authority of Stratton vs. California Land Company, that, while the assignee of a contract might maintain suit for specific performance, if the transaction took the form of a conveyance from the original vendee to a third party, the latter became a mere sub-purchaser, between whom and the original vendor no privity existed, and who, therefore, was incapable of maintaining such a suit. That proposition appears to be abandoned, and the contention here, if we may judge from the brief, is limited to the contention that the bill must allege an assignment of the contract by the original vendee, or, else, a conveyance by him, as the fact may be, and that to allege the one, and prove the other, is a fatal variance. It is respectfully submitted, on the contrary, that a conveyance by the original vendee to A is, in legal effect, and for every purpose, an assignment of the contract between himself and his own vendor. This proposition is established for this jurisdiction and the Federal courts by the decision of this Court in Buchanan *et al.*, vs. Upshaw, 1 How., 55, discussed by the Court of Appeals at pp. 157-8 of the Record. Unless it be Stratton vs. Cal.

Land Company, considered *supra*, no opposing authority is believed to exist.

At pp. 34-5 of the brief for appellant, Buchanan vs. Upshaw is attempted to be distinguished from the case at bar, the supposed distinction being based upon a brief quotation from the opinion in that case to the effect that there was "privity of contract between Upshaw and the complainants." This variation of the facts of that case from those of the case at bar, however, in no way affects the purpose for which the Court of Appeals cites Buchanan vs. Upshaw. Stratton vs. California Land Company had been urged by appellant for the proposition that the vendee of a vendee is a "sub-purchaser," and therefore can not maintain suit for specific performance. In Buchanan vs. Upshaw, one Roy had contracted to sell the land to Lyne Shackleford, who, after having first conveyed the land to Upshaw, sold it to one Buckner, who in turn sold and conveyed it to complainants, the only title of the latter thereto being under Buckner's deed to them, although in a subsequent transaction between Shackleford and Upshaw, to which neither Buckner nor the complainants were parties, Upshaw had agreed to confirm Shackleford's contract, which contract was made by him, not with complainants, but with Buckner. In other words, the original transaction was in effect a contract between Upshaw and Shackleford, or, if their contract that Upshaw would confirm Shackleford's sale to Buckner is to be taken as inuring to the latter, then the original transaction was at most a contract between Upshaw and Buckner, with which complainants had no connection of any kind beyond the fact that Buckner had conveyed the land to them—a case precise in analogy to the present, in which the appellant contracted with Mrs. Wilhoite, and she conveyed to appellee. This Court, at p. 84, said:

> "We also hold that there was privity of contract between Upshaw and the complainants. When he sanctioned Shackleford's contract with Buckner, he became a party to it; Buckner had assigned all its benefits to the complainants, and they must be considered as rightful assignees. * * * The equitable title being in the complainants by a contract complete in all its parts, they are entitled to a specific decree, of course, on principles too familiar to require authority to support them. On this part of the case the Court has had neither doubt nor difficulty in arriving at a decision favorable to a specific decree."

This case, it is submitted, is wholly conclusive of the case at bar. It determines, contrary to the view of the California court in the case referred to, that a "sub-purchaser" may institute suit for specific performance, and is entitled to that relief; and it further holds that, by the deed from Buckner to the complainants, the former "assigned to the complainants" all the benefits of the Shackleford-Upshaw contract, which decision fully sustains the allegations of appellee's bill in regard to the transactions between Mrs. Wilhoite and herself, "and that the complainants must be treated as rightful assignees."

> "The quit-claim deed from Mrs. Rupe to the plaintiff conveyed by assignment the equitable right of Mrs. Rupe in the premises and all her right under the contract with Hunt." Hunt vs. Hoyt, 10 Col., 282.

The proposition contended for by the appellee, thus established by the decision of this Court directly upon the point in Buchanan vs. Upshaw, is, in this jurisdiction, removed from the field of controversy, The same view is upheld throughout the States wherever the question has arisen, with the single exception it is believed of Stratton

vs. California Land Co. Among the authorities are Meyer vs. Mitchell, 75 Ala., 475, 480; Worthington vs. Lee, 61 Md., 530, 535; Currier vs. Howard, 14 Gray, 511, 513; Hunt vs. Hoyt, 10 Col., 278, 282; Robinson vs. Perry, 21 Ga., 183; Randolph vs. Wheeler, 182 Mo., 145, *155-8*; Harriman vs. Tyndale, 184 Mass., 534, 539.

In Buchanan vs. Upshaw, complainant's only title was by a formal deed to the land from the vendee under the original contract. This Court held that formal deed to be an assignment of the rights of the grantor in it, under his contract with one who was in legal effect his own vendor.

In Currier vs. Howard, one adjoining property owner had deeded his land to the complainant, with an accompanying verbal agreement that the grantee should have the grantor's rights under a written agreement between the latter and the other adjoining owner; *Held*, sufficient to enable the grantee to maintain the bill.

In Hunt vs. Hoyt, 10 Col., 278, 282, the vendee of land under a verbal contract, taken out of the Statute of Frauds by part performance, conveyed the land by deed to the complainant; the latter was held entitled to specific performance against the vendor in the verbal contract.

In Randolph vs. Wheeler, 182 Mo., 145, 155-8, the grantee of land by deed from the vendor in an executory contract for its sale, was held entitled to specific performance from the vendee in that contract.

In Robinson vs. Perry, 21 Ga., 183, the agreement was for sale by A to B, who assigned the agreement to C, who assigned it to D, who sold half the land to X and the remaining half to Y; held that X and Y were entitled to maintain their bill for specific performance against A.

In Harriman vs. Tyndale, 184 Mass., 534, 539, the purchaser of the vendee's rights from the latter's trustee in

bankruptcy was held entitled to enforce specifically. And see Morgan vs. Rhodes, 7 Eng. Ch., 435.

Recurring to the general subject, the right of the assignee of an original party to enforce specifically is further sustained in Bullion vs. Campbell, 27 Tex., 653, 665-6, and in Robinson vs. Williams, 3 Head, 540.

Although the contract provided that the vendee should not assign except with the consent of the vendor, yet, where the assignee of the vendee tendered the latter's promissory notes for the deferred purchase money, to be secured by a mortgage executed by the assignee upon the property, performance was decreed. Wagner vs. Chaney, 16 Neb., 202.

(b) The second proposition discussed under this, the second assignment of error, is one of fact. Its allegation is that the appellant was not merely a purchaser from Mrs. Wilhoite, as distinguished from her assignee, but that he was a purchaser "upon terms of sale differing in every respect from the terms of her contract with Mrs. Lenman."

The only difference between the two contracts with respect to the terms of sale set up in the answer are, first, that the sale by Mrs. Wilhoite to Jones was at an advance of $10,000, and that his contract with her required consummation within five days from May 3d, while the contract of the appellant and Mrs. Wilhoite was to be closed within twenty-eight days. With these variations, the agreement between Mrs. Wilhoite and appellee (Rec., 145-146) will be found to be *in ipsisimis verbis* with the contract between the appellant and Mrs. Wilhoite. The latter contract is, further, shown (Rec., 146) to have been extended on May 5th to May 29th, 1905, or practically to the expiration of the time limit in the original contract of sale.

That a vendee of a contract for the sale of real estate may not validly sell his rights under it to a third person

unless he sells for the same price for which he purchased, is a proposition not attempted to be supported by authority, and wholly inconsistent with the theory upon which specific performance rests; namely, that, in equity, such a contract converts the vendee into the owner of the property, subject only to the duty of performing his contract in regard to payment. If, as pointed out in the opinion of the Court of Appeals at pp. 156-7 of the Record, the vendee may convey, encumber and devise the land by will, if it descends to his heirs upon his death, if his wife is entitled to dower in the land and all the incidents of a real ownership belong to it, it is difficult to see why he may not sell it for the most advantageous price he can secure, subject, only, to performance of his contract with his own vendor. That, in the present case, literal and exact performance, in every particular, was tendered, and is preserved to the appellant by the decree from which she appeals (Rec., 48), is one of the few conceivable grounds of contention which, thus far, has not been urged against the appellee's right to the relief sought in the case.

III.

The third assignment of error is that Mrs. Wilhoite was not made a party to the bill, and that the appellee does not show that he is entitled to demand from her a deed of the Lenman Building.

Here, too, the objection is one in no way, however remotely, set up or suggested in the answer. The Court (Rec., 159) points out the fact that, so far as the Record discloses, the objection was not made below; while the assignment of errors in the Court of Appeals (Rec., 152) shows that it was an afterthought in that Court.

The only answer on behalf of appellant to this objection in the opposing brief (p. 32) is that her counsel "has very

little recollection of what took place during" the argument below. But "an assignment of errors cannot be availed of to import questions into a case which the Record does not show were raised and passed on by the Court below." Missouri, etc., R. R. Co. vs. Fitzgerald, 160 U. S., 575; Railroad Co. vs. McGuire, 196 U. S., 131-2.

It is freely conceded that the Court at any stage of a case may, *sua sponte*, raise the objection that necessary parties are not before it; but this is done only where there *are* necessary parties absent. Why is Mrs. Wilhoite's presence as a party necessary to the appellant's protection or interests? She executed the deed to the appellee set out at page six of the Record, and placed it in his hands for the very purpose of authorizing appellant to convey the property to him. She attended the tender at the time and place fixed therefor by the appellant and her counsel, for the purpose of aiding to bring about the execution of that conveyance by appellant. She has left her contract with the appellant to be enforced by the appellee, in his own interest, for more than twice the statutory limitation of time during which she, herself, could maintain such a suit. Equity does no vain thing. What advantage, even if the objection had been made in time, and if the assignor of a contract like this, who has assigned his interest, is a proper party to a suit for its enforcement, would accrue to anyone from an amendment at this stage of the case, making Mrs. Wilhoite a party, under the facts and circumstances of this case?

The authorities cited in support of this objection, it is submitted, are wholly insufficient for that purpose.

APPELLANT'S AUTHORITIES.

In Coiron vs. Millaudon, 19 How., 113, the property in question had been vested in a trustee or syndic of the creditors of an insolvent party by whom it had been sold. The bill was by the heirs of the insolvent against the syndic to set aside the sale on the ground of alleged irregularities in the insolvency proceedings, the mortgage creditors or parties secured by the conveyance to the syndic not being made parties to the bill. On the ground that the creditors were "the parties chiefly concerned in this proceeding," and that, if the sale should be set aside "they would be liable to refund the share of the purchase money each one had received in the distribution, the Court held them to be necessary parties, and therefore affirmed the decree below dismissing the bill because of their absence.

So in Hoe vs. Wilson, 9 Wall., 501, a part, only, of the heirs of a decedent had brought a bill to set aside sale of his realty for the payment of his debts, without making the creditor upon whose application the sale had been made, and others of the heirs, parties to the proceedings. The Court said:

> "But Zephaniah Jones, the complainant in the suit in which the decree of sale was made, and the other heirs at law of Ann R. Dermott are indispensable parties. No relief can be given in the case before us that will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the Court."

Slacum vs. Pomery, 6 Cranch., 221, was an action of debt, at law, against the endorser of a bill of exchange, the declaration in which action omitted to allege notice of protest. The Court arrested the judgment without a

formal motion in arrest, on the ground that "it is not too late to allege as error in this Court a fault in the declaration which ought to have prevented a rendition of a judgment in the Court below." In other words, the citation is authority for the proposition, only, that judgment will be arrested, even without a motion in arrest, when the declaration has failed to set up a cause of action.

So in Craigen vs. Lovell, 109 U. S., 194, 200, the Court held, merely, "the judgment, having been rendered on default upon a declaration setting forth no right of action, may be reversed on writ of error"—citing and following the precedent of Slacum vs. Pomery.

Barth vs. Clise, 12 Wall., 400, 403, was an action at law against a sheriff for allowing a defendant, whom he had produced in Court under a writ of *habeas corpus*, to escape while argument upon the writ was in progress. Upon the ground that the sheriff had performed his full duty under the writ upon his production of the defendant, and that, after such production and until the case was finally disposed of, the safekeeping of the person of the defendant was entirely under the control and direction of the Court, so that recovery in the action against the sheriff was impossible, the Court held that the instructions of the Court, however erroneous, would not constitute sufficient cause for reversal of the judgment. "The defect was incurable and inevitably fatal. When such a defect exists, whether it be or be not brought to the attention of the Court below, or to this Court by counsel, it is our duty to consider it and give it effect."

At page 35 of appellant's brief, the doctrine of Willard vs. Tayloe, 8 Wall., 557, that, where there is a complete assignment of the rights under a contract of purchase of real estate, the assignee stands in the shoes of his assignor, and has the same remedies, is conceded. If so, the only

remaining inquiry in the case would seem to be, What rights of Mrs Wilhoite under the contract with appellant of May 2d, failed of assignment to appellee by his contract with Mrs. Wilhoite of May 3d?

Of the authorities cited by appellant as opposed to the conclusion reached by the Courts below, McCarthy vs. Couch, 37 Minn., 124, was a case in which the original vendee, having contracted to sell to the complainant, had later refused to consummate his transaction with the original vendor, and complainant had filed a bill to require, first, that the original vendee should be decreed specifically to perform his contract with the original vendor, and that he should then be decreed specifically to perform his contract with the plaintiff—the terms of his contract with the original vendor not being stated. The opinion in the case is brief and without the citation of authorities upon the point decided, which was that the bill would not lie. If, notwithstanding these peculiar facts, it can properly be considered a decision that the vendee of a vendee is not entitled to specific performance as against the original vendor, it is in conflict with Buchanan vs. Upshaw, *supra*, and the overwhelming weight of authority.

In Simms vs. Lide, 94 Ga., 553, the suit was brought in the form of a bill for specific performance by the original vendee to the use of his own vendee, who was made a co-plaintiff against the original vendor, and the Court held that the relief prayed should have been granted. It does not hold that suit must have been brought in that form, or that it might not have been maintained by the ultimate vendee in his own name and without making his vendor a party.

In Lord vs. Underdunk, 1 Sandf., 46, the heirs of a vendee, under a parole contract for eight hundred acres of

land, for which he had paid the whole price, sold and conveyed one hundred acres to the complainant, who filed a bill against the heirs of the vendor to compel them to execute a conveyance to him of the one hundred acres so purchased. The Court held that, under a single, indivisible contract for the sale of eight hundred acres of land, the vendor might not be subjected to suits for specific performance by several contractors of his vendee for distinct portions of the whole eight hundred acres, "be it one acre or one hundred." The Court does say that, if the complainant became the purchaser of the entire eight hundred acres, the heirs of his vendor would have been necessary parties, citing Hooper vs. Donelly, 3 Hen. & Mun., 316; Duvall vs. Bibb, 4 *Ib.*, 113, and Van Meter vs. Williams Admnrs., 1 J. J. Marsh, 561; but the statement is *obiter*, and is in effect overruled by the later cases of Voorhees vs. de Meyer, 3 Sandf., 614, and Miller vs. Baer, 93 Paige, 467-8.

Hooper vs. Donnelly, 3 Hen. & Munf., 316, cited in Lord vs. Underdunk, is, also, overruled in the later case of Edgar vs. Donnally, 2 Munf., 387.

Van Meter vs. Williams' Admnrs., 1 J. J. Marsh, 561, the final case cited by the appellant in support of her contention upon this point, presented the following facts: Van Meter had sold a tract of land to Ray and McLain, the latter of whom had sold his interest in the purchase to Williams. Van Meter, Ray and Williams thereupon laid off by metes and bounds one hundred and two acres of the land sold for the latter, who paid for it with the exception of $100, for which suit was brought and judgment recovered by one Rudd, assignee of Williams' unsatisfied bond for that portion of the purchase money. Williams' administrators thereupon filed their bill against Van Meter and Rudd, alleging a deficit of twelve or fifteen acres

in the most valuable part of the land sold to Williams, which acres they alleged had been omitted from his deed. It was held that both Ray and the heirs of Williams were necessary parties; the former because a decree in favor of Williams and against Van Meter would not otherwise conclude Ray or affect his rights in the premises, and the heirs of Williams because it was their option either to accept a deed for the fifteen omitted acres, or to insist upon a rescission of the contract and damages for the breach of the bond for title given by Van Meter. In other words, Ray and the Williams heirs were necessary parties because of the fact that they were interested in the subject-matter of the suit, and no decree in the case could conclusively be valid unless they were before the Court.

The following authorities, it is submitted, are more in point, under circumstances like that in the case at bar:

> "It is objected that there is no sufficient evidence of the sale of the land and an assignment of the contract by Wisherd to the complainant, and that Wisherd should have been made a party defendant to the suit. The bill alleges that Wisherd sold the complainant his interest in the land, and made him a quit-claim deed therefor, and assigned to him the contract. Tested by the settled rules of equity pleading, the answer does not deny these allegations. (Citations.) * * * But the sale is abundantly proved, independently of the quit-claim deed. It is proved by the depositions of Wisherd and the complainant, which are a part of the Record in the case. The written declaration, under oath, of Wisherd and the complainant, that the sale was made, and that they desired that effect be given to it, is, in equity, as effectual to transfer Wisherd's equitable right in the property to the complainant as if the sale had been evidenced by the most formal written instrument, and entitles the complain-

ant to the same equitable remedies against the appellant to prove his title that Wisherd could have asserted if no sale had been made. Whether this sale was evidenced by a deed or an assignment of the contract, or rested on a parol agreement, is no concern of the appellant, so long as the parties to it are agreed that it was made, and have asserted the fact upon the record, in a mode that will estop them from asserting, at any time, the contrary against the appellant." Cheney vs. Bilby, 74 Fed. Rep., 52, 66 (C. C. A., 8th Circuit).

Equally effective evidence of Mrs. Wilhoite's sale to appellee, and that she desired that effect be given to it, is furnished by the Record in the present case.

In Davis, *et al.*, vs. Williams, *et al.*, 121 Ala., 542, it is held that the transferor is not even a proper party to an action by the transferee of a contract, the specific performance of which is sought; though in Shakespeare vs. Alba, 76 Ala., 351, the Court said:

"The assignment of the lease was absolute and unconditional, leaving no interest in the assignors, and the validity of the assignment is not assailed or denied. Where this is the case, and the original lessor makes no objection, in his answer or other pleadings to the solvency of the assignee, and does not specially ask, at the hands of the Court, the personal liability of the assignor for the covenants imposed by the lease, there can be no objection taken to the complainant's failure to make such assignor a party to his bill for specific performance. (Citations.)" The action was one for specific performance of a contract to make a lease.

"The defendant was bound by a written contract to make conveyance of the premises by a 'division deed.' Such a contract might be assigned for a sufficient consideration. (Citation.) And no assignment in writing is necessary to its validity. * * * The as-

signee of the written contract is entitled to maintain this action for a specific performance. (Citations.) The assignment being absolute and unconditional, and there being no remaining right or liability in the assignor which can be affected by the decree, it was not necessary to make him a party to the suit. (Citations.)" Currier vs. Howard, 14 Gray, 511.

"When the objection of the non-joinder of a party is not taken by demurrer or by plea, or by answer, such objection receives but little favor from the courts, and in such a case, to be of avail, it must appear that the decree will have the effect of depriving the party omitted of his legal rights. (Citation.)" R. R. Co. *et al.* vs. Elevator and Dock Co. *et al.*, 153 Ill., 70, 88.

"The objection that there is a defect of parties plaintiff can only be taken by answer or demurrer, and there was neither in this case. (Citations.)" Dreutzer vs. Lawrence, 58 Wisc., 594.

"The doctrine of specific performance does not depend upon such technical distinctions. Wherever, and without regard to the form and technical character of the contract, performance of a covenant in respect to lands would have been decreed between the parties to it, it will, in the absence of controlling intervening equities, 'be decreed as between persons claiming under them in privity of estate, or of representation, or of title.' (Citations.)" Hollander vs. Supply Co. (Md.), 71 Atl. Rep., 442, 445.

"It ought to be observed here, preliminarily, as a matter of practice, that although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing on appeal; except in very strong cases, and when the Court perceives that a necessary and indispensable party is wanted. The objection should be taken at an earlier step in the proceedings, by which great delay and expense would be avoided. The general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit, ought to be made parties

to it, either as plaintiffs or defendants; in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions: and is, more or less, a matter of discretion in the Court; and ought to be restricted to parties whose interest is involved in the suit, and thereby affected by the decree. The relief granted will always be so modified as not to affect the interest of others. (Citations.) * * * It is a well-settled rule, that no one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree. (Citations.)" Bank vs. Seton, 1 Pet., 299, 306.

El. converso, a defendant who neither requires, nor is entitled to relief against the omitted party, can not maintain the objection.

Among other cases holding that the vendee is not a necessary party to a suit by the assignee against the vendor for specific performance may be mentioned Miller vs. Whittier, *et al.*, 32 Me., 203; Betton vs. Williams, 4 Fla., 11.

And the converse, that, in an action by the vendee against the assignee or grantee of the vendor, the vendor himself is not a necessary party, has been held in Noonan vs. Orton, 4 Wisc., 346; Water Co. vs. Root, 56 Kans., 187; Van Dyke, *et al.*, vs. Cole, 81 Vt., 379.

IV.

The fourth assignment of error is, in effect, that appellant's contract of May 2d is not enforceable against her, under the statute of frauds. Here, again, we have a defense not introduced into the case by the pleadings, nor even by the assignments of error in the Court below. It makes its first appearance in the case in the assignment of error set forth at page 6 of the appellant's brief in this Court. This fact, alone, is fatal to the defense of the

statute. Browne on the Statute of Frauds, Sec. 508, and citations.

The contention that the appellant's contract, without parol evidence, is meaningless, might well be rested upon the contract itself (Rec., 5-6), independently of the consideration of that paper in the opinion of the Court of Appeals at pp. 52-3.

But, had there been no writing at all, the fact that the contract is fully set forth in the Bill (Rec., 2), and is confessed in the Answer (Rec., 11-12), of itself ousts the statute (Story's Eq. Jur., Sec. 755 and citations; Winn vs. Albert, 2 Md. Ch., 169; 29 Am. & Eng. Encyc., 853, Note 11.

V.

The fifth assignment of error, as heretofore stated, by reason of its generality and vagueness suggests no question for consideration, and is incapable of being entertained by the Court with any degree of adherence to its rules and decisions upon the subject. The argument under it, in the concluding pages of the brief for appellant, seems practically confined to the proposition that, although this Court usually adopts the concurrent finding of two Courts below upon a question of fact, it is not bound to do so—which is not disputed.

What remains of the argument under this final head seems to be a mere reiteration of charges of fraud and deception, unsupported except by attempted inferences and conclusions in respect to the facts which the testimony in the case, considered with fairness, wholly fails to support, and of legal conclusions from them for which authority is neither offered nor possible of production.

Respectfully submitted,

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